Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANCES E. LIVINGSTONE and
JOSEPH A. LIVINGSTONE, her husband
Petitioners,

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER; individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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100 pp

QUESTIONS PRESENTED FOR REVIEW

I. **Whether this Court should grant certiorari because the Circuit Court has acted in conflict with the Town of Newton v. Rumery, in holding that even when a release/settlement agreement is constitutionally invalid, a party nonetheless may not pursue a malicious prosecution/abuse of process claim, since termination of the underlying action was the result of a compromise?**

II. **Whether the Circuit Court erred in affirming the lower court's erroneous jury instructions which failed to note an adult child's consent to search her parent's residence, and, in particular, to enter one parent's locked and barricaded bedroom could be overridden by the present and objecting parents?**

III. **Whether the jury selection process violated Livingstone's due process rights to an impartial and randomly selected jury, when the ultimate jury foreman failed to disclose he knew a critical prosecution witness, voir dire questions were refused and the panel consisted of volunteers who held over from the regular pool?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated March 16, 2000, was not reported and appears at Appendix p3A. The trial court's Memorandum Opinion in the United States District Court for the Western District of Pennsylvania denying the Rule 50 motion, dated June 8, 1999, was not reported and appears at Appendix p39A. Previous opinions of the United States Court of Appeals for the Third Circuit in thus case appear at 12 F.2d 1205 and at 91 F.3d 515.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered March 16, 2000. Rehearing was requested but was denied on August 11, 2000. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners filed suit against the Respondents under the provisions of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Coumbia.

Petitioners claimed violations of the Fourth and Fouteenth Amendments to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describint the place to be searched, and the person or things to be seized.

> Section 1. All persons born or naturalized in the United States, and subject to the juridiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Frances and Joseph Livingstone filed this action on January 14, 1991 in the United States District Court for the Western District of Pennsylvania, invoking the District Court's jurisdiction under 28 U.S.C. §1343. Petitioners sought damages alleging the violation of their civil rights under 42 U.S.C. §1983 and ancillary state tort violations by defendants, local municipal police officers and their municipal employers, arising from an incident on January 12, 1989 in which the officers had entered the plaintiffs' house and been involved in an altercation with Frances Livingstone resulting in injuries to her. Included in the allegations were excessive force, unlawful entry of the residence, arrest without probable cause, the filing of false charges, assault and battery, malicious prosecution, abuse of process, invasion of privacy, conversion and intentional infliction of emotional distress.

Extensive pretrial proceedings had occurred in this case, including two earlier appeals to the Third Circuit Court of Appeals on the issue of the validity of an alleged release-dismissal agreement which was ultimately resolved in favor of plaintiffs. Pretrial statements had been filed prior to an earlier jury trial whose findings had been overturned by this Court. The Honorable Harvey Bartle, III, was specially assigned to the case from the Eastern District of Pennsylvania to this case in the United States District Court for the Western District of Pennsylvania. Judge Bartle required a final Pretrial Statement which could not supplement or add to earlier statements but had to be reduced to reflect the remaining issues in the case following the earlier appellate rulings.

Prior to the start of the jury trial, Judge Bartle made a ruling reaffirming and expanding an earlier ruling granting the Defendants' motion for summary judgment regarding the state torts of malicious prosecution and abuse of process with their related §1983 civil rights counts on the basis that plaintiffs had not received a favorable termination of the underlying proceedings. The court also granted a motion in limine filed by defendants restricting the plaintiff's expert on police procedures and the utilization of stun guns from giving his opinion that the marks on plaintiff's vaginal area observed by the emergency room physician who examined her shortly after the incident were consistent with marks left by a stun gun.

The jury trial in the matter began on October 7, 1998 before Judge Bartle. At the close of the plaintiff's evidence, the court granted a motion for directed verdict pursuant to FRCP 50 regarding Defendants North Belle Vernon Borough and Fayette City. Prior to instructing the jury on the law, the lower court overruled the plaintiffs' objections to the instructions he gave on the issues of consent, particularly third party consent, for entry of the police officers into the house, and specifically into the bedroom where the assault took place, and on the issue of the authority for police to intervene forcibly to wrest custody of a child from its grandmother.

Following a jury verdict in favor of defendants, plaintiffs filed a motion for new trial and/or judgment n.o.v. which was denied. This instant timely appeal followed.

Most of the issues presented for appeal concern legal and procedural issues which do not require an acceptance of the defendant municipalities' version of the facts. However, the issue of whether plaintiff Livingstone is entitled to a judgment n.o.v. regarding the consent to enter the residence would require the facts be viewed in the light most favorable to the defendants following the jury verdict. Accordingly, the salient facts, as verbatim summarized by the lower court, taking into account the inferences justified by the verdict, here follow:

The salient facts, viewed most favorably to defendants, are as follows. Carrie Livingstone, age twenty-two, and her son, fourteen months old, lived with Carrie's parents, plaintiffs Frances and Joseph Livingstone, in their home in Washington Township, Fayette County, Pennsylvania. On the evening of January 12, 1989, at the Livingstone home, Carrie and her father had an argument, during which Mr. Livingstone struck Carrie on the face, causing her lip to bleed. She ran out of the house to the community ambulance service, located across the street. After receiving a call from an ambulance service employee, Police Officer Monack met with Carrie and saw she had a swollen lip. She related to him that her father had struck her face during an altercation and that she wanted the police to retrieve her baby from the house so that she and the child could spend the night at a friend's house.

Officer Monack radioed Raymond Moody, Chief of Police for Fayette City Borough, and Darhl Snyder, an officer in the North Belle Vernon Police Department, for help. Both officers responded. They did so pursuant to an intermunicipal police cooperation agreement to which Washington Township, Fayette City Borough, and North Belle Vernon Borough were parties.

Under the agreement, an on-duty officer of one municipality could call upon an on-duty officer of another municipality for assistance.

The three officers went to the Livingstone home, where they knocked on the door. Mr. Livingstone permitted them to enter. Officer Monack spoke to Mr. and Mrs. Livingstone about what had happened during Mr. Livingstone's agument with Carrie. The officer told the Livingstones that Carrie wanted her baby and that the child would have to be returned to her. Mr. Livingstone agreed to make a written statement about his argument with his daughter at the nearby police station. While Officer Moody remained inside the house, Officers Monack and Snyder accompanied Mr. Livingstone outside, whereupon Mr. Livingstone walked by himself to the station to make his statement. No charges were ever filed against Mr. Livingstone.

Carrie, who had been waiting outside while the officers spoke to her parents, then invited Officers Monack and Snyder back into the house so that they could retrieve her child. See Tr. Oct. 14, 1998, pp. 184-85. (App. p. 1116a - 1117a) The officers did not have a warrant to enter the home, but Officer Monack knew Carrie lived there with her son. Carrie had resided in the house since she was born, and she and her son shared a bedroom across from her father's bedroom. According to Mr. Livingstone, Carrie had "free rein of the house, to go in any parts of the house that she wished." Tr. Oct. 8, 1998, p. 7. (App. p. 387a) She also had unrestricted authority to invite and bring friends into the house. See id.

In the meantime, Mrs. Livingstone, who maintained a bedroom separate from her husband, had taken Carrie's child into Mr. Livingstone's bedroom and had locked and barricaded the door. Officer Monack called to her, told her Carrie was with him, and requested that she give the baby to Carrie. Mrs. Livingstone refused. Officer Monack then picked the lock and tried to push open the door. When it opened only a few inches, he reached inside with his arm and tried to move the furniture that was

blocking the door. At that point, Mrs. Livingstone began repeatedly to threaten Officer Monack, yelling that she had a gun and would shoot him. Continuing her threats, she struck the officer on the arm with a metal rod, and then again with a wooden object. Officer Snyder kicked the door open, breaking it from its hinges.

The headboard of a bed obstructed the entrance, but Officers Monack and Snyder climbed over it. Mrs. Livingstone lunged at the officers and scratched Officer Monack on the face. Because she had assaulted him, Officer Monack told her she was under arrest. The officers struggled with Mrs. Livingstone in an attempt to restrain her and place her under arrest. She resisted by kicking, swinging her arms, and screaming. Officer Monack applied his stun gun to her left thigh. When she continued to trash about, he applied it once more to her thigh. She then calmed down, and Officer Snyder was able to handcuff her. Since Mrs. Livingstone refused to get up, the officers had to carry her out of the house. In the process, she hit them and began to thrash about again, causing the officers to fall while attempting to carry her.

The next morning, January 13, Officer Monack, on behalf of the Washington Township Police Department, charged Mrs. Livingstone with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. On the third day of the criminal trial, the Court of Common Pleas of Fayette County entered an order dismissing the action because of an oral agreement entered into by the parties. The settlement was never reduced to writing.[1]

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[1]The jury in this case was not asked to make any findings regarding the criminal proceeding against Mrs. Livingstone, nor was it presented with detailed evidence about that proceeding. The facts in this paragraph are taken from the magistrate judge's June 8, 1994 report and recommendation, adopted as the opinion of the court in its July 11, 1994 order granting summary judgment on Counts III and IV in favor of the defendants, which the Livingstones did not appeal. See discussion, infra.

The remaining facts put forward, to address the other issues are not taken from the lower court's summary, but rather directly from the record.

Throughout these proceedings following the decision to bar the malicious prosecution counts, the core of the plaintiffs' case focused upon two primary contentions: (1) that the parents never consented to the police search resulting in the assault; (2) that excessive force was utilized when a stun gun was applied to Mrs. Livingstone's vaginal area. However, corrobatory testimony linking the lesions in Mrs. Livingstone's vaginal area, by the manufacturer's expert, was not permitted to be heard by the jury. Other key medical testimony was excluded since there was permitted no supplementation of the expert reports although several years had passed since the first pleadings were filed due to the appeals.

Carrie Livingstone, testified about the nature of the consent she had given the police. Essentially it was an instruction to retrieve the child. The parents, who owned the home, did not consent to the search. Mrs. Livingstone expressly objected to it.

Manuel Yocolano, who was ultimately the jury foreman, denied knowing any of the witnesses who were identified to be called, including Carrie Livingstone, during voir dire. None of the jury pool responded affirmatively to the standard question of knowing the witnesses. However, it was later revealed that Carrie visited the Yocolano residence, approximately 12 years earlier to date Yocolano's brother. This had not been earlier realized because no inquiries during voir dire was permitted regarding the municipal residence of the jurors. See Livingstone Affidavit, (App. p. 1642a) Yocolano was one of the several jurors who knew local policemen, a product of a "volunteer" pool of jurors.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari because the Circuit Court has acted in conflict with the Town of Newton v. Rumery, in holding that even when a release/settlement agreement is constitutionally invalid, a party nonetheless may not pursue a malicious prosecution/abuse of process claim, since termination of the underlying action was the result of a compromise.

Certiorari was granted in the case of Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187 (1987), because the case raised a question important to the administration of criminal justice. 107 S.Ct. at 1191. In 1987 four Justices held the agreement to waive the right to file a civil rights suit (based on false arrest, false imprisonment and defamation) in exchange for the dismissal of criminal charges, would be enforceable if it resulted from a decision that is voluntary, deliberate and informed. (Plurality opinion of Justice Powell, joined by CJ Rehnquist, White Scalia and O'Connor, except as to Part III-B.) Four Justices filed a dissent persuaded that federal policies behind §1983 mandate a strong presumtion against the enforceability of such agreements. A critical opinion, seeking to outline the factors to be evaluated, was rendered by Justice O'Connor in a concurring opinion. O'Connor wrote to emphasize that the burden of establishing that the agreement is neither involuntary nor the product of an abuse of the criminal process falls upon those relying on such covenants.

Frances Livingstone, the plaintiff below, spent several years, including two appeals to the Third Circuit in order to overcome the threshhold question of whether an alleged release-dismissal agreement was enforceable. The Third Circuit, in an en banc decision, initially overturned a summary judgment grant for the police defendants and directed a trial on the issue of whether theter was a voluntary, deliberate and informed release. Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993)(en banc).

On the first remand, a jury ruled that there was a voluntary agreement. On a second appeal, a panel of the Third Circuit reversed and set forth standards to guide the district court in determining whether such an alleged agreement was in violation of public policy. Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 534 (3d Cir. 1996). The panel vacated the earlier jury verdict finding that the Court should have employed a "clear and convincing" burden of proof to establish the voluntariness of the agreement. This time, on remand, the district court granted a partial summary judgment in favor of plaintiff Livingstone, holding that the prosecutor failed to give sufficient reasons to establish a legitimate rationale for entering into the release-dismissal agreement. In relevant part, the district court made the following analysis:

> A section 1983 claim is based on improper action by an individual acting under color of state law which results in "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. S 1983. Therefore, before Heneks (Heneks was the prosecutor) (Parentheses added) could reasonably determine whether the Livingstones section 1983 was marginal or frivolous, he had to consider the evidence of the alleged police misconduct. Indeed, Heneks admitted that, "[w]ell, to the extent that there's a medical report indicating there's some kind of injury undefined and to the extent that a stun gun was used on an area that was somewhere close to it, there at least was some basis to at least start with an analysis of whether there was a civil action." Plaintiffs' Exhibit A at pg. 52. Notwithstanding these facts, Heneks only conducted a casual analysis of the viability of the Livingstones' section 1983 claim, and ultimately decided the case based on the officers' version of events rather than Mrs. Livingstone's version. Id. at 78.
>
> Furthermore, Heneks had no evidence which "undercut" Mrs. Livingstone's medical evidence. During his deposition, Heneks stated that he did not believe that Dr.

Noche, who examined Mrs. Livingstone after the incident, had fabricated the report. Plaintiffs' Exhibit A at pg. 45. Instead, Heneks accepted the officers' statements that Mrs. Livingstone could have injured herself. Id. at 34, 44. This, however, is insufficient to undermine plaintiffs' medical evidence.

In Livingstone II, the Court of Appeals advised that it "would not suffice for the defendant municipalities and police officers to demonstrate on remand that Heneks was aware of other evidence that merely contradicted the . . . evidence of police misconduct. . . . Instead, defendants would have to demonstrate that Heneks was aware of other evidence that rendered the . . . evidence of police misconduct fundamentally untrustworthy." 91 F.3d at 532. Heneks' deposition reveals that he did not possess such evidence.

Given these facts, we find that the agreement is unenforceable as a matter of law. We therefore will grant plaintiffs' motion for partial summary judgment, and deny defendants' motion for partial summary judgment.

Opinion pp. 10-11. App. 69A-70A.

Following this partial summary judgment grant, the matter was permitted to proceed to trial. The matter did proceed to verdict regarding plaintiff's claim regarding the application of excessive force, as well as other Fourth Amendment violation claims. On these matters, the jury returned a verdict in favor of the law enforcement defendants.

However, the jury was not permitted to consider the plaintiff's federal §1983 claims concerning malicious prosecution and abuse of process growing out of the improper bringing of several charges against her, which initially resulted in a criminal trial which was aborted as a result of the alleged release-dismissal agreement. It was determined as a matter of law, that the existence of the agreement itself, whether or not it was valid under federal law, destroyed the ability of the plaintiff to demonstrate that the

underlying charges were terminated in her favor. The Third Circuit's Memorandum opinion at page 27 provided as follows:

> Valid or invalid, the agreement, as well as the state's subsequent termination of the proceedings, were the products of compromise. As we have previously recognized, "[i]n order to state a prima facie case for a section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time." Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) (citations omitted). As we further recognized in Hilfirty, "dismissal of charges as a result of compromise is not an indication that the accused is actually innocent of the crimes charged." Id. at 580 (citing Restatement (Second) of Torts § 660 cmt. c). "[T]he fact of a compromise indicates that the question of [the accused's] guilt or innocence is left open." Id. Because the charges against Mrs. Livingstone were dismissed pursuant to a compromise, the District Court correctly concluded that she could not show that the criminal proceedings against. her terminated in her favor. Accordingly, the District Court did not err in dismissing her § 1983 claim for malicious prosecution. See id.; see also Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980) (to prevail on a malicious prosecution claim brought under § 1983, the plaintiff must prove "that the prosecution terminated in some manner indicating that the person was not guilty of the offense charged."); Evans v. Ball, 168 F.3d 856, 859 (5th Cir. 1999); Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir. 1994); Junod v. Bader, 458 A.2d 251, 253-54 (Pa. Super. 1983) (holding that withdrawal of a criminal charge pursuant to an agreement of compromise is insufficient under Pennsylvania law to establish a favorable termination).

Nine years of appellate work resulted in the creation of the leading precedent in the Third Circuit on the issue of overturning

release/dismissal agreements under impliedly coercive circumstances. The Livingstone precedents essentially stand for the proposition that the police and prosecutors have a heavy burden to justify the obtaining of a release from civil charges while the defendant is under the threat of criminal charges. The elaborate procedure establishing the difficult hurdles for the police and prosecutor necessary to justify the release, now makes it clear that such releases are not favored in that Circuit.

The exact same rationale supports the idea that plaintiffs should have been permitted to proceed with their malicious prosecution claim. If the release was obtained coercively, contrary to public policy and without justification under civil rights law, then it would be incongruous to nonetheless give legal effect to the set-aside agreement by making it the vehicle by which it was determined there is no favorable termination. The coercive aspect of obtaining the agreement vitiated the consent and nullified the agreement. Since the agreement was a nullity, the dismissal of charges constitutes a favorable termination. Consistency mandates that the malicious prosecution and abuse of process components of the civil rights count be permitted to proceed.

Justice O'Connor, in her Rumery concurrence, made clear the policy considerations that supported setting aside coercive release dismissal agreements:

> On the other hand, as the court acknowledges, release-dismissal agreements potentially threaten the integrity of the criminal process and preclude vindication of federal civil rights. Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. *Ante*, at 1192. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only

of the victim of such abuse, but also of society as a whole. (emphasis added)

Rumery, 107 S.Ct. at 1196.

The general rationale put forward by the Third Circuit, indicating that there must be a favorable termination of the underlying criminal charges before there can be a civil action for malicious prosecution has been accepted by several other circuits as noted in the quoted portion of the Third Circuit opinion. It is obvious that this holding, that an invalid release-dismissal agreement, nonetheless prevents the filing of a claim for malicious prosecution, totally destroys the policy behind Rumery. As Justice O'Connor feared, public officials may bring frivolous criminal charges to coerce a release-dismissal agreement. Even if the release-dismissal agreement is set aside as the constitutionally infirm product of coercion, the public official is nonetheless immune from the civil action.

This appears to be an issue of first impression and of great importance regarding the fair administration of criminal justice. As was demonstrated in this case, the effort to remove a release-dismissal agreement is extraordinarily difficult and burdensome. The harsh reality is that an individual can hardly afford the time and expense of penetrating this threshold issue. To find that a party cannot proceed with a malicious prosecution claim, arguing that the criminal charges had been filed without probable cause or for an improper purpose, even after it has been established that the release had been improperly coerced, shreds to tatters the Rumery rationale seeking to protect the citizen and his or her rights.

This Court is urged to grant certiorari and revisit Rumery. In thirteen years the rationale put forward in that case has not been reviewed at this level. The instant case presents an opportunity to examine the efforts of the Third Circuit to create workable standards under the general direction of Rumery split opinions.

Most importantly, the instant case would allow this Court to head-off the silent destruction of the Rumery policy, by a clear indication that constitutionally invalid agreements cannot still be utilized as a justification to defeat §1983 actions based upon malicious prosecution claims.

II. The Circuit Court erred in affirming the lower court's erroneous jury instructions which failed to note an adult child's consent to search her parent's residence, and, in particular, to enter one parent's locked and barricaded bedroom could be overridden by the the present and objecting parents.

Under the Circuit Court's ruling in this case, a third party child's consent to search the locked and barricaded bedroom of one of her parents in the parents' residence where she was also living was valid even over the vocifierous objections of the both parents who were present at the time and who were the owners of the residence. This ruling conflicts with this Court's decision decision concerning third party consent issues in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.21d 242 (1974), which outlined the several factors to be taken into account in determining whether a third party could grant consent for the search of another's premises. In particular, although the Court determined that a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected may consent to a search, such consent would only be valid "as against the absent, nonconsenting person with whom that authority is shared." Id., 415 U.S. at 170.

The Circuit Court's ruling is also in conflict with decisions on the issue by other Circuits. A major case on the issue of third party consent is United States v. Impink, 728 F.2d 1228 (9th Cir. 1984), which stated that factors to be considered include: 1) determining whether the third party has an equal right of access to the place at issue; 2) whether the objector is present or absent; and 3) whether there was an active objection or merely non-consent.

See, also, U.S. v. Warner, 843 F.2d 401, 402 (9th Cir.1988); U.S. v. Valencia-Roldan, 893 F.2d 1080, 1082 (9th Cir. 1990); U.S. v. Rosi, 27 F.3d 409, 412 n. 2 (9th Cir.1994).

In the instant case, the facts as put forward by the police demonstrate clearly that as a matter of law, effective consent cannot be found under the Impink factors. First, it is clear that Carrie Livingstone did not have an equal right of access to the premises, especially to the bedroom of Joseph Livingstone. Carrie Livingstone was an adult child, who did not pay rent, did not own the house, and simply was allowed to live there at the pleasure of her parents. The parents, as title owners to the house, clearly had the superior right of access and control over the structure. Carrie had no rights, except to the extent voluntarily granted by the parents, without any consideration. While Carrie had the run of the house and could invite her friends to be present, it is obvious that the parents would not delegate her authority to utilize the police, over their objections, in the course of a dispute among themselves. Further, at the time of the intrusion, it could be inferred that Carrie had abandoned the premises and had articulated her intent not to return.

Secondly, the objectors were present. Joseph Livingstone had permitted only a limited entry and then left with the police. From her conduct, and express language, Mrs. Livingstone made her objections unequivocally clear. It has been specifically held that the police cannot intentionally bypass a party who is present and known by them to possess a superior privacy interest and instead seek to rely on a third party's consent. Impink, supra. at 1234.

There is absolutely no authority for the proposition that a non-rent paying adult child can grant consent to police to search a premise over the objection of an owner/parent present on the scene. This is especially true since there is no indication of any color of consent to enter Joseph's bedroom. The government must demonstrate specific consent by a person with authority over the

particular portion of the premises at issue. See Unites States v. Gonzalez Athehorta, 729 F.Supp. 248 (E.D.N.Y. 1990) (even if the girl friend of an apartment tenant had authority to consent to a search of an apartment she would not have authority to consent to search of a bedroom belonging to another tenant in the absence of a further grant of specific authority.)

Thirdly, where there is an absolute and active objection, rather than a mere nonconsent by the party having the clearly superior privacy right, there is great doubt of the validity of the third party's consent. Impink, supra. Any review of this record demonstrates that Mrs. Livingstone's objections were highly active as they included repeated threats to dismember vital body parts by the use of a .357 magnum should the bedroom door be opened. As noted in Impink, from the totality of circumstances it is clear that there could not be effective consent.

Other cases listed in Impink, are particularly instructive. The established federal principle is that where a suspect is present and objecting to a search, implied consent by a third party with an inferior primary interest is ineffective. The supporting cases cited, while state court cases, are highly analogous to the instant facts and were specifically relied upon by the federal court. These cases included Padron v. State, 328 So.2d 216 (Fla.App.1976)(son cannot consent when parent present and objecting). The Florida Supreme Court has since in Saavedra v. State, 622 So.2d 952 (Fla.1993), revised the issue of whether a minor can provide consent to a search of the house in the absence of parents objection or presence, but it specifically retained the central holding of Padron that the minor's consent could be overridden where the parent was present and objecting. Id., 622 So.2d at 960 n.9. It reiterated the rule that a joint occupant or one sharing dominion and control over the premises may provide valid consent only if the party is not present or if the party is present and not does not object to the search. Silva v. State, 344 So.2d 559 (Fla.1977). This determination by the Florida Supreme Court is a reasoned and valid reading of the United States Supreme Court's determination in Matlock and this

Court is urged to strengthen that rule. Another case is Hembree v. State, 546 S.W.2d 235 (Tenn.Cr.App. 1976)(son cannot consent when parents present). If the parents had not been present, Carrie would have had authority to consent since she had access to the premises. But her interest here, from the totality of the circumstances, clearly was not superior to the interest of the present and objecting parents. See United States v. Rosi, 27 F.3d 409 (9th Cir.1994).

The other circuits have often based the issue on the equality of the right of access. Compare Impink, supra, and Warner, supra (involving the uneven rights of landlord and tenant) with United States v. Morning, 64 F.3d 531 (9th Cir.1995) (consent by co-tenant valid over co-tenant with equal rights and access even though co-tenant present and objecting). In this case, Joseph and Francis Livingstone were the owners of the property and allowing their daughter to stay with them. While she was permitted to bring visitors to the house and had free rein of the common areas, this would not necessarily include her father's bedroom, particularly if the door was locked and barricaded shut. While the issues of access and control do not solely rely on notions of property law (see Matlock, supra, 415 U.S. at 172, n.7), such law is relevant to the issue. U.S. v. Morning, 64 F.3d 531, 536 n.6 (10th Cir. 1995).

In determining whether a third party has the authority to give a binding consent to a particular area of the house, several circuits have ruled that it is necessary to show that the third party had access to the area, mutual use of the area and a substantial interest in or common authority over the property. United States v. Whitfield, 939 F.2d 1071, 1074 (D.C.Cir.1991); United States v. Davis, 967 F.2d 84, 87 (2d Cir.1992); U.S. Falcon, 766 F.2d 1469, 1474 (10th Cir.1985)(but see U.S. v. Rith, 164 F.3d 1323 (10th Cir. 1999)(need mutual use or control for most purposes over the area). The Fourth Circuit requires that the third party have common authority over, general access to, or mutual use of the premises under circumstances that make it reasonable to believe that the

third party has the right to permit a search. U.S. v. Block, 590 F.2d 535, 539-40 (4th Cir.1978).

Both the lower court and the Circuit Court extrapolated the statement by Joseph Livingstone that Carrie had free rein of the house to mean that she had access to all of the house, including the bedroom. However, it is noted that no evidence was adduced to indicate that she had unbridled access to her father's bedroom, particularly when the door was closed. Certainly, even that statement would not indicate that she had mutual use of the bedroom or control over that portion of the premises under the circumstances here presented. As note in Rith, supra, 164 F.3d at 1330, the issue of joint access is a fact-intensive inquiry requiring findings by a court that the third party entered the premises or room at will, without the consent of the subject of the search. No evidence beyond Mr. Livingstone's statement was adduced in this case. On such a critical issue, evidence should have been specifically addressed on the question of access to her father's locked bedroom. This significant inquiry did not occur and hence the ability to demonstrate the access is not established.

Rith also set forth the standard regarding control: "[C]ontrol for most purposes of property is a normative inquiry dependent upon whether the relationship between the defendant is the type which creates a presumption of control for most purposes over the property by the third party." Id. In the situation of a parent's control over a child's room or the joint control by spouses, such control can be shown. However, the same cannot be said of a child's control over the parent's bedroom. Normally, that relationship would not have such control. Nothing in this case would indicate such control by Carrie over her father's bedroom. Therefore, the inexplicit, unspoken third party "consent" by Carrie for a search of her father's bedroom was not valid, particularly over the objections of Joseph and Frances Livingstone who were present. It is inconceivable that a daughter who was being permitted to live at the residence would have equal or greater status than Mrs. Livingstone who was a deeded owner of the premises.

Petitioners contend the instruction given by the district court on the issue of the authority of Carrie Livingstone was a prejudicial error of law because it did not go far enough. The instruction failed to properly inform the jury that Carrie's consent, even if given, would be insufficient to override the objections of the parents who were present on the scene, who actually owned the property, who lived in the home as their residence and who had no lease with their adult daughter who was paying no rent. Under the circumstances, the daughter was permitted access to the home at their toleration. She had no right in law that could overcome the superior rights of the parents under the circumstances.

In upholding this instruction the Circuit Court set forth a standard which is inconsistent both with this Court's holding in Matlock, supra, as well as with holdings on this issue by other Circuits.

III. The jury selection process violated Livingstone's due process rights to an impartial and randomly selected jury, when the ultimate jury foreman failed to disclose he knew a critical prosecution witness, voir dire questions were refused and the panel consisted of volunteers who held over from the regular pool.

Finally, the Third Circuit panel considered the Livingstones' challenge to the jury pool and foreman at pages 13 through 19 of their opinion. App. 12A-18A. Although the panel recognized that the jury pool had been selected from volunteers, over fifty percent of which were related to police officers, the panel indicated that there was insufficient evidence of prejudice to justify a finding of plain error. The Livingstones complained that they later discovered that the jury foreman knew their daughter Carrie, a chief defense witness, and the foreman failed to reveal that knowledge during voir dire.

The key panel rationale in this regard follows:

> More importantly, the Livingstones have failed to present any evidence that the juror in question was being dishonest in failing to respond affirmatively when the jurors were asked whether they knew any of the parties or witnesses in the case. Even if we were to assume that the juror had had some passing contact with the Livingstones' daughter in the past, it would not be unresaonable to think he may simply have forgotten her in the intervening years. A mistaken but honest answer to a question on voir dire is not grounds for a new trial. (Citation omitted.) To obtain a new trial, as the Linvingstones seek, they are required to show:(1)that a juror failed to answer honestly a material question on voir dire; and (2)that a correct response would have provided a valid basis for challenging for cause. (Citation omitted.) They have failed to make the necessary showing. (See Opinion, pp. 17-18.)

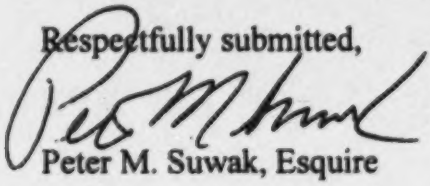
However, the Livingstones had submitted an affidavit attached to their motion for new trial. They then requested the lower court to grant them permission to speak to the juror and to hold a hearing to determine the juror's motives. It is respectfully submitted that the panel has erred to conclude that the legal standard cannot be met in the absence of the grant of this permission and hearing. This is particularly true since the jury apparently chose to disregard the testimony of Dr. Noche, the emergency room physician who observed a white burn-like lesion in the vaginal canal of Mrs. Livingstone a few hours after she was subjected to the stun gun attack. In light of the extended history of this case, the Livingstones ask the court to remand the matter so that there can be a hearing regarding the juror and a determination as to whether or not they can fairly be expected to accept the jury's result.

Due process concerns and fundamental fairness require no less.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire

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UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3593

FRANCES E. LIVINGSTONE; and
JOSEPH A. LIVINGSTONE, her husband
Appellants

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 91-cv-00059)
District Judge: Honorable Harvey Bartle, III

Submitted Under Third Circuit LAR 34. 1 (a)
February 4, 2000

BEFORE: MANSMANN, NYGAARD, and RENDELL, Circuit Judges.

(Filed March 16, 2000)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

Joseph and Frances Livingstone, husband and wife, initiated this civil action in January 1991. Since then, the case has become a frequent visitor to this court, and is now before us on appeal for the third time. The Livingstones claim that the defendant police officers violated their civil rights during a confrontation at their home in January 1989. Having been twice remanded, the case was finally tried to a jury in October 1998. After the Livingstones rested their case, the District Court granted judgment as a matter of law in favor of two of the defendant municipalities. Thereafter, the jury returned a verdict in favor of the remaining defendants on all counts. The Livingstones then moved the court for judgment as a matter of law which the District Court denied.

In this appeal, the Livingstones argue that the District Court erred by denying their motion for judgment as a matter of law. They also attack the District Court's instructions to the jury, as well as the selection of the jury itself. In addition, they claim that the District Court: (1) abused its discretion by excluding certain expert testimony they proffered; (2) erred by determining that criminal proceedings against Mrs. Livingstone did not terminate in her favor; and (3) erred by granting judgment for two of the defendant municipalities as a matter of law. We will affirin on all issues.

I.

The salient facts, as viewed most favorably to the defendant-appellees and taken essentially verbatim from the District Court's memorandum, are as follows. Carrie Livingstone, age twenty-two, and her son, fourteen months old, lived with Carrie's parents, plaintiffs Frances and

Joseph Livingstone, in their home in Washington Township, Fayette County, Pennsylvania. On the evening of January 12, 1989, Carrie and her father had an argument at the Livingstone home, during which Mr. Livingstone struck Carrie on the face, causing her lip to bleed. She ran out of the house to the community ambulance service, located across the street. After receiving a call from an ambulance service employee, Police Officer Monack met with Carrie and saw she had a swollen lip. She told him that her father had struck her face during an altercation and that she wanted the police to retrieve her baby from the house so that she and the child could spend the night at a friend's house.

Officer Monack radioed Raymond Moody, Chief of Police for Fayette City Borough, and Darhl Snyder, an officer in the North Belle Vernon Police Department, for help. Both officers responded. They did so pursuant to an intermunicipal police cooperation agreement to which Washington Township, Fayette City Borough, and North Belle Vernon Borough were parties. Under the agreement, an on-duty officer of one municipality could call upon an on-duty officer of another municipality for assistance. The three officers went to the Livingstone home, where they knocked on the door. Mr. Livingstone permitted them to enter. Officer Monack spoke to Mr. and Mrs. Livingstone about what had happened during Mr. Livingstone's argument with Carrie. The officer told the Livingstones that Carrie wanted her baby and that the child would have to be returned to her. Mr. Livingstone agreed to make a written statement about his argument with his daughter at the nearby police station. While Officer Moody remained inside the house, Officers Monack and Snyder accompanied Mr. Livingstone outside, whereupon Mr. Livingstone walked by himself to the station to make his

statement. No charges were ever filed against Mr. Livingstone.

Carrie, who had been waiting outside while the officers spoke to her parents, then invited Officers Monack and Snyder back into the house so they could retrieve her child. See Tr. Oct. 14, 1998, pp. 184-85. The officers did not have a warrant- to enter the home, but Officer Monack knew Carrie lived there with her son. Carrie had resided in the house since she was bom, and she and her son shared a bedroom across from her father's bedroom. According to Mr. Livingstone, Carrie had "free rein of the house, to go in any parts of the house that she wished." Tr. Oct. 8, 1998, p. 7. She also had unrestricted authority to invite and bring friends into the house. See id.

In the meantime, Mrs. Livingstone, who maintained a bedroom separate from her husband, had taken Carrie's child into Mr. Livingstone's bedroom and had locked and barricaded the door. Officer Monack called to her, told her Carrie was with him, and requested that she give the baby to Carrie. Mrs. Livingstone refused. Officer Monack then picked the lock and tried to push open the door. When it opened only a few inches, he reached inside with his arm and tried to move the furniture that was blocking the door. At that point, Mrs. Livingstone began repeatedly to threaten Officer Monack, yelling that she had a gun and would shoot him. Continuing her threats, she struck the officer on the arm with a metal rod, and then again with a wooden object. Officer Snyder kicked the door open, breaking it from its hinges.

The headboard of a bed obstructed the entrance, but Officers Monack and Snyder climbed over it. Mrs. Livingstone lunged at the officers and scratched Officer

Monack on the face. Because she had assaulted him, Officer Monack told her she was under arrest. The officers struggled with Mrs. Livingstone in an attempt to restrain her and place her under arrest. She resisted by kicking, swinging her arms, and screaming. Officer Monack applied his stun gun to her left thigh. When she continued to thrash about, he applied it once more to her thigh. She then calmed down, and Officer Snyder was able to handcuff her. Since Mrs. Livingstone refused to get up, the officers had to carry her out of the house. In the process, she hit them and began to thrash about again, causing the officers to fall while attempting to carry her.

The next morning, January 13, Officer Monack, on behalf of the Washington Township Police Department, charged Mrs. Livingstone with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. On the third day of the criminal trial, the Court of Common Pleas of Fayette County entered an order dismissing the action because of an oral agreement entered into by the parties. The settlement was never reduced to writing.[1]

The Livingstones filed this action on January 14, 1991. The defendants moved to dismiss, or in the alternative, for summary judgment. The District Court granted the summary judgment motion on the ground that

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[1]The jury in this case was not asked to make any findings regarding the criminal proceeding against Mrs. Livingstone, nor was it presented with detailed evidence about that proceeding. The facts in this paragraph are taken from the Magistrate Judge's June 8, 1994 report and recommendation, adopted as the opinion of the court in its July 11, 1994 order granting summary judgment on Counts III and IV in favor of the defendants, which the Livingstones did not appeal. See discussion, infra.

the suit was barred by the release-dismissal agreement entered into during the criminal trial. On appeal, this court reversed, concluding that genuine issues of material fact existed as to whether the Livingstones gave informed and voluntary consent to release their rights to sue. See Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993) (en banc).

After the case was remanded, the District Court held a jury trial on the question of whether the Livingstones had voluntarily entered into the release-dismissal agreement. Because the jury's verdict answered the question in the affirmative, the court entered judgment in favor of the defendants. On appeal a second time, a panel of this court determined, among other things, that defendants had to prove voluntariness of agreement with clear and convincing evidence, not merely by a preponderance, as the trial court had charged. See Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 534 (3d Cir. 1996). Consequently, the panel vacated the judgment and remanded.

On remand, the case was tried. As noted above, after the plaintiffs had rested, defendants North Belle Vernon Borough and Fayette City Borough moved for judgment as a matter of law with respect to the § 1983 claims, the only claims asserted against them. The District Court granted the motions pursuant to Rule 50 of the Federal Rules of Civil Procedure. The jury later returned a verdict in favor of the remaining defendants on all counts. The court then entered judgment in favor of the defendants and against the plaintiffs.

II.

A.

The first issue the Livingstones raise in this appeal is whether the District Court erroneously instructed the jury concerning their daughter's authority to consent to a search of their home. The District Court instructed the jury as follows:

> The Fourth Amendment States, ["t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.[..."] Ordinarily, a search warrant must be obtained from a judge before any search of a home may be made. In this case, there was no search warrant. There are, however, certain exceptions to the search warrant requirement.
>
> Once such exception, where a search warrant is not needed, is a search conducted by consent. If a person, in lawful possession of a home, freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct a search, to the extent of the consent so given. The people who may consent to a search of a residence include not only the individuals who own the property being searched, but also any third party who possesses common authority over the premises. ["]Common authority["] means that the third party has mutual use of the property and, generally, has joint access or control for most purposes. Any consent must be given voluntarily. Whether a consent is voluntary depends on the totality of the circumstances.
>
> Another exception to the warrant requirement is recognized in emergency situations ....

Tr. Oct. 20, 1998, pp. 15-16.

The Livingstones argue that the above quoted jury instructions did not go far enough. They argue that the District Court should also have instructed the jury that "a non-rent paying adult child" has no authority to consent to a police search of her parents' home "over the objection of an owner/parent present on the scene." Appellant's Br. at 16. In addition, they argue that the District Court should have instructed the jury that, to the extent consent is given, that consent must be "unequivocally, specifically and intelligently given, and must be proved by clear and positive evidence." Id. at 14. We find these arguments unpersuasive.

In determining whether a jury instruction misstates a legal standard, our review is plenary. See Koppers Co., Inc. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1445 (3d Cir. 1996) (citing Savarese v. Agriss, 883 F.2d 345, 348 (3d Cir. 1988)). "We consider the jury instructions as a whole to determine whether they fairly and adequately contain the law applicable to the case." Id. (citing Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995); Savarese, 883 F.2d at 1202).

It is well established that the Fourth Amendment's protection against unreasonable searches and seizures is tied to reasonable expectations of privacy, not to traditional notions of property rights. Indeed, in the proper circumstances, a person in a public telephone booth may be entitled to a greater degree of Fourth Amendment protection than a person who has invited a third party into his private home. Compare Katz v. United States, 389 U.S.

347 (1967) with United States v. Lewis, 385 U.S. 206 (1966).

It is similarly well established that a third party who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give valid consent to a search. See United States v. Matlock, 415 U.S. 164, 171 (1974); United States v. Anderson, 859 F.2d 1171, 1176-77 (3d Cir. 1988) (citation omitted). "'Common authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes .....'" Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (citing Matlock, 415 U.S. at 171 n. 7).

The Livingstones acknowledge that, even as a non-rent paying resident of their home, their daughter had some authority to consent to a search of their home. See Appellant's Br. at 18. Nevertheless, they argue that whatever authority she had, it was inferior to their own authority "as title owners to the house." Id. at 15. They further argue that because Mrs. Livingstone was present at the time, and unequivocally objected to the presence of the officers, any consent their daughter may have given was ineffective to overcome Mrs. Livingstone's superior objections.

In support of their argument, the Livingstones cite United States v. Impink, 728 F.2d 1228 (9th Cir. 1984), as casting "great doubt [on] the validity of the third party's consent" where a party with a superior privacy right actively and absolutely objects to the search. See Appellant's Br. at 16. As the District Court correctly noted, however, Impink does not cast nearly so large a shadow of doubt. The Impink court did hold that "[wlhere a suspect is

present and objecting to a search, implied consent by a third party with an inferior privacy interest is ineffective." Id. at 1234 (citations omitted). The suspect in Impink, however, was a lessee, while the third party was a landlady who had orally reserved a limited right to enter a leased garage for the sole purpose of retrieving a space heater she had stored there. See id. at 1230.

Reviewing the facts before it, the Impink court held that "[a]s between a lessor with a narrowly proscribed right of access, there can be no doubt that the resident has the greater right of 'access or control for most purposes.'" Id. at 1233 (footnote omitted) (quoting Matlock, 415 U.S. at 171 n.7). That conclusion, the court noted, was "based on actual expectations of privacy rather than common law definitions of property rights." See id. at 1233 n.4 (citing Matlock, 415 U.S. at 171 n.7). In other words, the landlady's legal ownership of the property in question was insufficient to give her an equal, much less superior right of access and control. The determinative factor was the parties' relative rights of access and control.

In contrast to the landlady in Impink, the Livingstone's daughter had unlimited access to their home. As the Livingstones themselves put it, their daughter "had the run of the house," including the authority to invite others into it. Appellant's Br. at 15. She had, as Mr. Livingstones testified, "free rein ... to go in any parts of the house that she wished." Tr. Oct. 8, 1988 at 7, reproduced in App. at 387a. This is hardly the type of limited right of access at issue in Impink.

As the Supreme Court explained in Matlock,

> the authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n.7. By the Livingstones' own admissions, their daughter had "joint control and access for most purposes." Accordingly, she had authority to consent to a search of her parents' house.

To be valid, Carrie Livingstone's consent to the search of her parents's house must have been given voluntarily. See Schneckloth v Bustamonte, 412 U.S. 218, 222 (1973); see also United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994) (citing Schneckloth). Whether or not consent has been given voluntarily is evaluated based on the totality of the circumstances. See Schneckloth, 412 U.S. at 227. Accordingly, the District Court instructed the jury that "[a]ny consent must be given voluntarily. Whether a consent is voluntary depends on the totality of the circumstances." We find no error here.

Having held that the Livingstones' daughter had the authority to consent to a search of their home, we find it unnecessary to decide whether that authority extended to Mr. Livingstone's bedroom. Once the police had valid consent to enter the house itself, the fact that Mrs. Livingstone had taken her grandson into the bedroom, where she claimed to have a loaded gun and threatened to

use it, clearly created exigent circumstances. As the District Court correctly instructed the jury, exigent circumstances can justify a warrantless search and seizure with or without valid consent. See Parkhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996) (citing Welsh v. Wisconsin, 466 U.S. 740, 749 (1984)).

The Livingstones next argue that the District Court erred by instructing the jury concerning the right of the police to take action in child custody matters. See Appellant's Br. at 19. Specifically, they challenge the court's instruction that "it is the law in Pennsylvania that a parent has the right to custody of her child absent convincing reasons that it would not be in the bests interests of the child." Tr. Oct. 20, 1998 at 16. The Livingstones argue that this instruction erroneously implied that Pennsylvania's child custody laws authorized the police to take Mrs. Livingstone's grandson from her by force so that the child could be returned to his mother. We find no such impermissible implication, however. As the District Court noted, the instruction merely "provided the jury with a basis for determining whether ... the child's mother[] acted properly in directing the officers to retrieve her child from Mrs. Livingstone." Dist. Ct. Mem. at 14.

B.

In addition to challenging the instructions given to the jury, the Livingstones also challenge the selection of the jury itself. The jury pool apparently consisted of potential jurors who had indicated they would be available to serve longer than the normal two week period generally required. See Dist. Ct. Mem. at 7 n.2; Tr. Oct. 7, 1998 at 42. The Livingstones argue that limiting the pool of potential jurors to those who volunteered to serve for more than two weeks

"destroyed the random selection of the jury selection process." Appellant's Br. at 22.

As the District Court correctly noted, however, the Livingstones failed to preserve this objection for appeal. See Horsey v. Mack Trucks, Inc., 882 F.2d 844, 849 (3d Cir. 1989) (citing Fed. R. App. P. 10(b), I l(a)) (additional citations omitted). In fact, after making a brief reference to the jury selection procedure, the Livingstones' counsel explicitly stated that he "was not making any, any adverse comment about that procedure" and that he understood it "was a necessary and reasonable procedure." Tr. Oct. 7, 1998, p. 42. While we have discretion to review the Livinastone's objections on appeal, we are limited to review for plain error. See United States v. Olano, 507 U.S. 725, 732 (1993); see also Pennsylvania Envtl. Defense Fund v. Canon-McMillan School Dist, 152 F.3d 228, 234 (3d Cir. 1998) (acknowledging applicability of plain error review in the civil context). Moreover, our discretion to reverse for plain error requires that the "district court has committed a serious and flagrant error that jeopardized the integrity of the proceeding." Pennsylvania Envtl. Defense Fund, 152 F.3d at 234 (citation omitted).

Under the plain error standard, there must be: (1) error; (2) that is plain; and (3) that effects substantial rights. Id. To effect substantial rights, "the error must be prejudicial and must have affected the outcome of the district court proceedings." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997). Moreover, the party claiming plain error has the burden of proving prejudice and effect, and must generally do so with specificity. See Olano, 507 U.S. at 735.

The Livingstones argue that "the act of accepting volunteers" was error because it "destroyed the random selection of the jury selection process and is not authorized by statute or law." Appellant's Br. at 22. They have not argued that the error was plain, however. More importantly, they have not argued prejudice and effect with anywhere near the required specificity. Instead, their argument is limited to the observation that

> [t]he nonrandom jury pool manifested itself in the representation in the pool of over twenty of the forty jurors polled being related to, or otherwise friends of police officers. Several of these individuals sat upon the final jury. Others had to be eliminated through the use of the plaintiffs' preemptory [sic] challenges.

Id. at 24.

Such a generalized observation is hardly enough to demonstrate that any jurors were actually biased by their relationships with police officers, much less that any such bias affected the jury's decision. Indeed, as discussed in more detail below, the District Court took precautions during voir dire to ensure that potentially biased members of the pool were excluded from the final panel. Accordingly, the Livingstones have failed to show plain error, much less plain error deserving of a discretionary power of reversal that we "exercise only 'sparingly.' " Pennsylvania Envtl. Defense Fund, 152 F.3d at 234 (quoting Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976, 933- 94 (3d Cir. 1996)).

The Livingstones next challenge the District Court's decision not to question each potential juror individually for possible bias. They argue that because a disproportionately large number of the potential jurors were either related to or friends with law enforcement officials,

there was a disproportionate risk of bias in favor of the defendants in this case. In their view, the court should have "specifically question[ed] each [potential juror] to insure the absence of bias, as opposed to just a general question." Tr. of Oct. 7, 1998 at 43.

The decision to submit specific questions during voir dire, or to question members of the jury pool individually, is left to the sound discretion of the trial court. See Fed. R. Civ. P. 47(a); see also Mu'Min v. Virginia, 500 U.S. 415, 422 (199 1) (noting that voir dire is "conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.") (quoting Conners v. United States, 158 U.S. 408, 413 (1895)). In this case, the District Court first posed a series of general questions regarding bias to the jury as a whole. When several members of the pool responded that their relationships with police officers might affect their ability-to be fair and impartial, the court questioned them individually. Several potential jurors were stricken as a result. See Tr. of Oct. 7, 1998 at 44-46. Consequently, the court decided there was no need for additional individualized questioning. We can find no abuse of discretion in that decision.

The Livingstones also challenge the District Court's denial of several voir dire questions they had requested be posed to the jury pool. First, they challenge the court's decision not to ask each potential juror to identify the specific municipality in which they resided. Once again, however, they failed to preserve this issue for appeal. Their counsel simply informed the District Court that he had "looked over our jury questionnaire and I notice they do not give us the specific residences for the jurors, and other than just a general location. And I would [sic] I am accustomed to the residence information." Tr. Oct. 7, 1998 at 285a. The

court then noted that the questionnaire did identify each prospective juror's county of residence, and that information regarding specific township or borough had been recently omitted from the form. See id. at 286a. Thereafter, the Livingstones' counsel made no objection, and simply moved on to another matter. See id. Accordingly, the Livingstones waived the issue on appeal, and our review is limited to plain error. Even were we to apply a higher standard of review, however, we would find the Livingstones' argument on this issue without merit.

The Livingstones argue that because they only knew the potential jurors' county of residence, Mrs. Livingstone failed to recognize that one of the jurors knew their daughter, who they describe as a key witness in the case. Despite their contentions to the contrary, however, the Livingstones failed to show that the juror in question actually knew their daughter. The mere fact that the Livingstones' daughter may have dated the juror's brother some twelve or thirteen years before the trial does not prove that the juror also knew her.

More importantly, the Livingstones have failed to present any evidence that the juror in question was being dishonest in failing to respond affirmatively when the jurors were asked whether they knew any of the parties or witnesses in the case. Even if we were to assume that the juror had had some passing contact with the Livingstones' daughter in the past, it would not be unreasonable to think he may simply have forgotten her in the intervening years. A mistaken but honest answer to a question on voir dire is not grounds for a new trial. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984). To obtain a new trial, as the Livingstones seek, they are required to show: (1) that a juror failed to answer honestly a material

question on voir dire; and (2) that a correct response would have provided a valid basis for challenging for cause. See id. at 556. They have failed to make the necessary showing.

In their final challenge to the jury selection process, the Livingstones' contend that the District Court erred by denying their challenge for cause of a juror who was an attorney, and who served as a solicitor for several municipalities as well as the state police. They argued before the District Court that, "as an attorney representing municipalities," the juror's "line of work would bring him into the perspective of being an ... advocate for the municipalities." Tr. of Oct. 7, 1998 at 33. The District Court responded by posing a number of questions concerning potential bias to the juror at issue.

The court first asked whether the juror represented any of the municipalities involved in this case. The juror responded that he did not. See id. at 34. The court then asked whether the juror could be fair and impartial in this case, deciding it based solely on the evidence and the law as the court gave it. The juror answered in the affirmative. See id. Asked whether his representations of municipalities or the state police would affect his impartiality in this case, the juror responded that it would not. See id. at 35, 37. Thus assured that the juror would be impartial, the court declined to strike him for cause. See id. at 37. Thereafter, the Livingstones used one of their peremptory challenges to strike the juror. They now claim that being erroneously forced to use a peremptory challenge to strike a juror who should have been stricken for cause serves as "another example of the nonrandom and prejudicial nature of the jury pool." Appellant's Br. at 28.

We review the District Court's rejection of a challenge for cause for abuse of discretion. See Kirk v. Raymark Indus., Inc., 61 F.3d 147, 153 (3d Cir. 1995). As we have previously noted, "the trial judge is in the best position to assess the credibility and demeanor of the prospective jurors," and thus to determine whether a prospective juror can perform his duties impartially. See id. "A juror is impartial if he or she can lay aside any previously formed impression or opinion as to the merits of the case and can render a verdict based on the evidence presented in the court." Id. (internal quotation marks and additional citations omitted).

In this case, the District Court specifically questioned the individual juror at issue, and determined that the juror could be impartial. The mere fact that the juror represented municipalities in no way connected with this case is an insufficient basis for concluding that, despite his assurances, the juror could not be impartial. The Livingstones having offered no facts of record indicating that the juror could not be impartial, the District Court did not abuse its discretion in finding that he could.

C.

The Livingstones also appeal from two of the District Court's evidentiary rulings. First, they challenge the District Court's decision to limit the range of testimony their stun gun expert could offer at trial. Next, they challenge the District Court's refusal of their request to supplement the reports of other experts. They argue that each of these rulings constituted an abuse of the District Court's discretion. We disagree.

At trial, the Livingstones sought to admit expert testimony on a number of issues ranging from proper police procedures to the effects of using a stun gun. The District Court allowed the Livingstones' expert to testify regarding proper police procedures and what a reasonable, well-trained police officer would and would not do. See Tr. Oct. 9, 1998 at 138. The court also allowed the Livingstones' expert to describe the injury typically inflicted by use of a stun gun. See Tr. Oct. 13, 1998 at 83-84. The court further allowed the expert to testify that marks on Mrs. Livingstone's thigh, depicted in pictures taken after she was arrested, were consistent with the type of marks left by a stun gun. See Tr. Oct. 14, 1998 at 22.

The Livingstones further sought to have their expert testify concerning a notation in a medical report prepared the night Mrs. Livingstone was arrested. The notation, made by an examining physician, concerned a lesion the physician had observed in Mrs. Livingstone's vaginal area. The expert would have testifled that the lesion noted in the report was consistent with the application of a stun gun in the vaginal area. The District Court barred the testimony, however, ruling that it constituted a medical opinion that the Livingstone's expert was not qualified to give.

The Livingstones now contend that the District Court abused its discretion by excluding the proffered testimony. They argue that because their expert "had observed numerous stun gun applications and was familiar with the low grade bums left by stun gun usage, he had the appropriate expertise to render this opinion." Appellant's Br. at 29. They do not contend that their expert was qualified to give medical opinions, however, or to interpret medical reports. Nor do they contend that their expert had ever observed the effect of applying a stun gun to the

vaginal area. Thus, we cannot conclude that the District Court abused its discretion by ruling that the Livingstones' expert was not qualified to offer the proffered opinion. See Fed. R. Evid. 702 (permitting opinion and other testimony by a witness "qualified as an expert by knowledge, skill, experience, training or education.").

The Livingstones also claim that the District Court abused its discretion by refusing permission to supplement their expert reports. According to the Livingstones, the district judge to whom their case had originally been assigned had granted permission to supplement the reports. See Appellant's Br. at 30. Following notice that the matter would be reassigned to a new judge, the Livingstones' counsel "awaited the pretrial conference to establish the precise date for supplementation." Id. at 31. This was, the Livingstones explain, their counsel's "usual practice" and he "inadvertent[ly] assumed" that it would pass muster with the new judge. At the conference, however, the District Court apparently denied permission to supplement on the grounds that allowing the defendants an appropriate time for response would cause an undue delay in this already protracted action. See Pl.'s Final Supp. Pretrial Statement, reproduced in Appellant's App. at 172a.

We find the Livingstones' argument on this issue notably lacking not only in merit, but also in detail. They cite to nothing in the record memorializing the claimed grant of permission to supplement by the original trial judge. Nor do they cite to the documents with which they wished to supplement their expert reports, indicate when they were prepared, or explain why they could not have been added to the record at an earlier date. Accordingly, we can find no abuse of discretion in the District Court's denial of permission to supplement.

D.

The Livingstones next appeal the District Court's dismissal of their federal malicious-prosecution and abuse-of-process claims. They contend that the District Court erred as a matter of law by concluding that state criminal proceedings against Mrs. Livingstone did not conclude in her favor. They further contend that the District Court erred by finding that there was no evidence to support their abuse-of-process claim.. Once more, we disagree.

Following the confrontation that gave rise to this case so many years ago, the police charged Mrs. Livingstone with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. On the third day of her criminal trial, the parties entered into an oral settlement agreement. Pursuant to that agreement, the charges against Mrs. Livingstone were dropped, and the criminal trial terminated. In return, the Livingstones orally agreed to sign a release of all civil claims against the defendants upon reimbursement for certain medical and property damage expenses resulting from the confrontation. Though the parties anticipated reducing their oral agreement to writing at a future date, they never did so. Nor did the Livingstones ever submit the bills that the defendants had agreed to reimburse. Instead, the Livingstones initiated the current action, asserting, inter alia, state-law claims for malicious prosecution and abuse of process as well as related federal civil rights claims under 42 U.S.C. § 1983.

The defendants responded to the Livingstones' complaint by moving for summary judgment based on the parties' oral release-dismissal agreement. The District Court

granted the motion. On appeal, this court reversed, holding that there were genuine issues of material fact concerning whether the Livingstones' assent to the agreement was informed and voluntary. See Livingstone I,- 12 F.3d at 1214. Upon remand, the case was assigned to a Magistrate Judge.

The Magistrate Judge concluded that the criminal proceedings against Mrs. Livingstone had terminated as a result of the compromise established in the parties' oral release-dismissal agreement. The Magistrate Judge then concluded that because the proceedings were terminated by compromise, they were not terminated in Mrs. Livingstone's favor for purposes of sustaining a malicious-prosecution claim. Consequently, he recommended that this claim be dismissed. He also recommended that the abuse-of-process claim be dismissed "because there was no evidence of the required 'perversion of the [judicial] process.'" Dist. Ct. Mem. at IS (quoting Rep. and Rec., June 8, 1994, pp. 13-14).

The District Court adopted the Magistrate Judge's recommendations, and granted summary judgement in favor of the defendants on the Livingstones' state-law malicious-prosecution and abuse-of-process claims. The court then held a jury trial on the sole issue of whether the Livingstones had entered into the release-dismissal agreement voluntarily. The jury answered in the affirmative, and the District Court entered judgment in favor of the defendants.

The Livingstones appealed for a second time, challenging both the District Court's determination that the release-dismissal agreement did not violate public policy, and its jury instruction that only a preponderance of the

evidence was required to support a finding that they had entered the agreement voluntarily. Reversing once more, a panel of this court held that the District Court had failed to make the determinations necessary to find that the agreement did not violate public policy. See Livingstone II, 91 F.3d at 530, 533. The panel also held that the proper burden of proof on the issue of voluntariness required clear and convincing evidence. See id. at 534. The Livingstones did not appeal, and the panel did not consider, the issue of whether the District Court had erred in granting summary judgment on their state-law malicious-prosecution and abuse- of-process claims. See Appellants' Br. at 34.

Remanded for a second time, the case was ultimately reassigned and tried to a jury without further consideration of the release-dismissal agreement. At trial, the District Court dismissed the Livingstones' federal malicious-prosecution and abuse-of- process claims. The court concluded that the elements of the federal claims were the same as the elements of the state-law claims on which summary judgment had previously been granted. The court further concluded that because the state-law malicious prosecution claim had failed for lack of favorable termination in the underlying criminal proceedings against Mrs. Livingstone, the federal claim must also fail. Similarly, the court concluded that because there was no evidence of perverse, coercive or otherwise improper use of the criminal proceedings to support the state-law abuse-of-process claim, there could be no such evidence to support the federal claim. In denying the Livingstones' subsequent motion for judgment as a matter of law, the District Court noted that the Livingstones' counsel had apparently "acquiesced in the court's decision not to charge the jury on the § 1983 claims for malicious prosecution and

abuse of process." See Dist. Ct. Mem. at 18 (citing Tr. Oct. 14, 1998 at 258-62).

In this appeal, the Livingstones contend that the District Court erred as a matter of law in finding that the underlying criminal proceedings did not terminate in Mrs. Livingstone's favor. They argue that because they had prevailed in opposing summary judgment based on the release-dismissal agreement, that agreement "can no longer be utilized as legal justification to declare the absence of a favorable termination." Appellants' Br. at 32. We find the argument misplaced.

As an initial matter, this court never held the release-dismissal agreement invalid. On the two other occasions that this case has come before us, we have simply held that the District Court did not then have before it the facts necessary to grant summary judgment based on the agreement. If the agreement has since been "set aside" as the Livingstones contend, see id., they point to nothing in the record establishing that fact. In any event, the validity of the release-dismissal agreement is immaterial to this issue. The fact remains that the state agreed to terminate the criminal proceedings against Mrs. Livingstone pursuant to the agreement. If, as the Livingstones contend, the state cannot rely on the agreement because it is invalid, then neither can they rely on the states' termination of the criminal proceedings based solely on that same agreement to contend that the termination was in their favor.

Valid or invalid, the agreement, as well as the state's subsequent termination of the proceedings, were the products of compromise. As we have previously recognized, "[i]n order to state a prima facie case for a

section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time." Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) (citations omitted). As we further recognized in Hilfirty, "dismissal of charges as a result of compromise is not an indication that the accused is actually innocent of the crimes charged." Id. at 580 (citing Restatement (Second) of Torts § 660 cmt. c). "[T]he fact of a compromise indicates that the question of [the accused's] guilt or innocence is left open." Id. Because the charges against Mrs. Livingstone were dismissed pursuant to a compromise, the District Court correctly concluded that she could not show that the criminal proceedings against. her terminated in her favor. Accordingly, the District Court did not err in dismissing her § 1983 claim for malicious prosecution. See id.; see also Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980) (to prevail on a malicious prosecution claim brought under § 1983, the plaintiff must prove "that the prosecution terminated in some manner indicating that the person was not guilty of the offense charged."); Evans v. Ball, 168 F.3d 856, 859 (5th Cir. 1999); Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir. 1994); Junod v. Bader, 458 A.2d 251, 253-54 (Pa. Super. 1983) (holding that withdrawal of a criminal charge pursuant to an agreement of compromise is insufficient under Pennsylvania law to establish a favorable termination).

Nor did the District Court err in dismissing the Livingstones' § 1983 claim for abuse of process. The District Court granted summary judgment against the Livingstones on their parallel state-law claim for lack of evidence that the underlying criminal proceedings were 46perversely, coercively, or improperly used." Dist. Ct. Mem. at 17 (citation omitted). The Livingstones failed to

appeal that ruling in their previous appearance before this court, and are thus barred from challenging it now. Consequently, dismissal of their federal claim, which requires proof of the same elements, see McArdle v. Tronetti, 961 F.2d 1083, 1088 (3d Cir. 1992), was not erroneous.

E.

The Livingstones also challenge the District Court's grant ofjudgment as a matter of law in favor of defendants North Belle Vernon Borough and Fayette City Borough. See Fed. R. Civ. P. 50 (authorizing judgment as a matter of law where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue."). As part of this action, the Livingstones asserted § 1983 claims against both boroughs for allegedly failing to train their police officers in the manner necessary to protect the Livingstones' civil rights. When the Livingstones rested their case, the District Court granted the boroughs' motion for judgment as a matter of law, ruling that the Livingstones had failed to sustain their burden of proof to prevail on the claims. The Livingstones contend that the District Court erroneously ignored record evidence that supported their claims.

To prevail on a failure-to-train claim, a plaintiff must show not only that the relevant municipality actually failed to train its police officers adequately, but also that the failure amounted to a "deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989) (footnote omitted). The Livingstones do not contend that neither North Belle Vernon Borough nor Fayette City Borough adequately trained their police officers. Instead,

they contend that Washington Township failed to train its officers adequately, and that the boroughs "uncritically" allowed their own officers to "follow the lead" of Washington Township's inadequately trained officers.

Even if we assume that this facially tenuous claim establishes inadequate training on the part of the boroughs, it does nothing to establish deliberate indifference. The Livingstones have presented no evidence that the boroughs were aware of the allegedly inadequate training provided to Washington Township's police officers. Nor have they presented any evidence that the need for more or different training was obvious, or that the inadequacy was so likely to result in the violation of constitutional rights that the boroughs' policy makers can reasonably be said to have been deliberately indifferent to the need. See Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton, 489 U.S. at 389). Consequently, the District Court did not err in granting the boroughs' motion for judgment as a matter of law.

F.

In the final issue raised in this appeal, the Livingstones contend that the District Court erred by denying their motion for judgment as a matter of law. They argue that because their daughter lacked authority to consent to a search of their home, the defendants violated their Fourth Amendment rights "as a matter of law and all activity occurring subsequent to entry was unconstitutional." We have already rejected this argument, however, and will therefore affirm the District Court on this issue.

III.

We hold that the District Court did not erroneously instruct the jury regarding the authority of the Livingstones' daughter to consent to a search of their home. We also hold that the District Court did not err in excluding testimony from the Livingstones' stun gun expert regarding an issue on which he lacked the requisite expertise. We further hold that the District Court did not err by concluding that the criminal proceedings against Mrs. Livingstone did not terminate in her favor, or by granting judgment as a matter of law to two of the defendant municipalities in this case. Finally, we hold that the District Court properly determined that the Livingstones' were not entitled to judgment as a matter of law. The Livingstones having failed to preserve any objection to the manner in which the jury was selected, we decline to consider their arguments on that issue. Accordingly, the judgment below is affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard-L. Nygaard
Circuit Judge

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3593

FRANCES E. LIVINGSTONE; and
JOSEPH A. LIVINGSTONE, her husband
Appellants

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 91-cv-00059)
District Judge: Honorable Harvey Bartle, III

Submitted Under Third Circuit LAR 34. 1 (a)
February 4, 2000

BEFORE: MANSMANN, NYGAARD, and RENDELL, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34. 1 (a) on February 4, 2000.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the District Court entered on June 10, 1999, is hereby **AFFIRMED.**

Costs taxed against appellants.

ATTEST:

Acting Clerk

Date: March 16, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3593

FRANCES E. LIVINGSTONE; and
JOSEPH A. LIVINGSTONE, her husband
Appellants

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

On Appeal frrom the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 91-cv-00059)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, ANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, and BARRY,
Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/_____
United States Circuit Judge

Date: August 11, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE, et a	:	CIVIL ACTION
v.	:	
	:	
NORTH BELLE VERNON BOROUGH, et al.	:	NO. 91-59

MEMORANDUM

Bartle, J. June 8, 1999

This is a civil rights action under 42 U.S.C. 1983 which arises out of a confrontation with the police on the evening of January 12, 1989, when the police responded to a domestic dispute at plaintiffs' home. Plaintiffs have sued North Belle Vernon Borough, Fayette City Borough, and Washington Township, as well as police officers Frank Monack, Raymond Moody, and Darhl Snyder. This case has a long and complex history. After two trips to the Court of Appeals, it was reassigned to the undersigned for trial, which took place in Pittsburgh in October, 1998. See Livingstone v. North Belle Vernon Borough, 91 F.3d 515 (3d Cir. 1996); Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993) (en banc). After the close of the plaintiffs' case, the court entered judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure in favor of defendants North Belle Vernon Borough and Fayette City Borough. The jury thereafter returned a verdict in favor of the remaining defendants. Presently before the court is plaintiffs- motion for a new trial and/or judgment notwithstanding the verdict.

I.

Generally, the decision regarding whether to grant a new trial is committed to the sound discretion of the trial

court. See Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 (3d Cir. 1995). In considering plaintiffs' motion for judgment notwithstanding the verdict, we view the evidence in the light most favorable to the defendants, the verdict winners. See id. We must determine whether a reasonable jury could have found for the defendants. See id.

II.

The salient facts, viewed most favorably to defendants, are as follows. Carrie Livingstone, age twenty-two, and her son, fourteen months old, lived with Carrie's parents, plaintiffs Frances and Joseph Livingstone, in their home in Washington Township, Fayette County, Pennsylvania. On the evening of January 12, 1989, at the Livingstone home, Carrie and her father had an argument, during which Mr. Livingstone struck Carrie on the face, causing her lip to bleed. She ran out of the house to the community ambulance service, located across the street. After receiving a call from an ambulance service employee, Police officer Monack met with Carrie and saw she had a swollen lip. She related to him that her father had struck her face during an altercation and that she wanted the police to retrieve her baby from the house so that she and the child could spend the night at a friend's house.

Officer Monack radioed Raymond Moody, Chief of Police for Fayette City Borough, and Darhl Snyder, an officer in the North Belle Vernon Police Department, for help. Both officers responded. They did so pursuant to an intermunicipal police cooperation agreement to which Washington Township, Fayette City Borough, and North Belle Vernon Borough were parties. Under the agreement, an on-duty officer of one municipality could call upon an on-duty officer of another municipality for assistance.

The three officers went to the Livingstone home, where they knocked on the door. Mr. Livingstone permitted them to enter. Officer Monack spoke to Mr. and Mrs. Livingstone about what had happened during Mr. Livingstone's argument with Carrie. The officer told the Livingstones that Carrie wanted her baby and that the child would have to be returned to her. Mr. Livingstone agreed to make a written statement about his argument with his daughter at the nearby police station. While Officer Moody remained inside the house, Officers Monack and Snyder accompanied Mr. Livingstone outside, whereupon Mr. Livingstone walked by himself to the station to make his statement. No charges were ever filed against Mr. Livingstone.

Carrie, who had been waiting outside while the officers spoke to her parents, then invited Officers Monack and Snyder back into the house so that they could retrieve her child. See Tr. Oct. 14, 1998, pp. 184-85. The officers did not have a warrant to enter the home, but Officer Monack knew Carrie lived there with her son. Carrie had resided in the house since she was born, and she and her son shared a bedroom across from her father's bedroom. According to Mr. Livingstone, Carrie had "free rein of the house, to go in any parts of the house that she wished." Tr. Oct. 8, 1998, p. 7. She also had unrestricted authority to invite and bring friends into the house. See id.

In the meantime, Mrs. Livingstone, who maintained a bedroom separate from her husband, had taken Carrie's child into Mr. Livingstone's bedroom and had locked and barricaded the door. Officer Monack called to her, told her Carrie was with him, and requested that she give the baby to Carrie. Mrs. Livingstone refused. Officer Monack then picked the lock and tried to push open the door. When it

opened only a few inches, he reached inside with his arm and tried to move the furniture that was blocking the door.. At that point, Mrs. Livingstone began repeatedly to threaten Officer Monack, yelling that she had a gun and would shoot him. Continuing her threats, she struck the officer on the arm with a metal rod, and then again with a wooden object. Officer Snyder kicked the door open, breaking it from its hinges.

The headboard of a bed obstructed the entrance, but Officers Monack and Snyder climbed over it. Mrs. Livingstone lunged at the officers and scratched Officer Monack on the face. Because she had assaulted him, Officer Monack told her she was under arrest. The officers struggled with Mrs. Livingstone in an attempt to restrain her and place her under arrest. She resisted by kicking, swinging her arms, and screaming. Officer Monack applied his stun gun to her left thigh. When she continued to thrash about, he applied it once more to her thigh. She then calmed down, and Officer Snyder was able to handcuff her. Since Mrs. Livingstone refused to get up, the officers had to carry her out of the house. In the process, she hit them and began to thrash about again, causing the officers to fall while attempting to carry her.

The next morning, January 13, Officer Monack, on behalf of the Washington Township Police Department, charged Mrs. Livingstone with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. On the third day of the criminal trial, the Court of Common Pleas of Fayette County entered an order dismissing the action because of an oral agreement

entered into by the parties. The settlement was never reduced to writing.[1]

The Livingstones filed this action on January 14, 1991. The defendants moved to dismiss, or in the alternative, for summary judgment. The district court granted the summary judgment motion on the ground that the suit was barred by the release-dismissal agreement entered into during the criminal trial. The Court of Appeals for the Third Circuit reversed, concluding that genuine issues of material fact existed as to whether the Livingstones gave informed and voluntary consent to release their rights to sue. See Livingstone, 12 F.3d 1205.

After the case was remanded, the district court held a jury trial on the question of whether the Livingstones had voluntarily entered into the release-dismissal agreement. Because the jury's verdict answered the question in the affirmative, the court entered judgment in favor of the defendants. On appeal a second time, the Court of Appeals determined, among other things, that defendants had to prove voluntariness of agreement with clear and convincing evidence, not merely by a preponderance, as the trial court

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[1] The jury in this case was not asked to make any findings regarding the criminal proceeding against Mrs. Livingstone, nor was it presented with detailed evidence about that proceeding. The facts in this paragraph are taken from the magistrate judge's June 8, 1994 report and recommendation, adopted as the opinion of the court in its July 11, 1994 order granting summary judgment on Counts III and IV in favor of the defendants, which the Livingstones did not appeal. See discussion, infra.

had charged. See Livingstone, 91 F.3d at 534. The court vacated the judgment and remanded.

On remand, the case was tried. As noted above, after the plaintiffs had rested, the court granted the motions of defendants North Belle Vernon Borough and Fayette City Borough pursuant to Rule 50 of the Federal Rules of Civil Procedure for judgment as a matter of law with respect to the §1983 claims, the only claims asserted against them. The jury later returned a verdict in favor of the remaining defendants on all counts. The court then entered judgment in favor of the defendants and against the plaintiffs.

III.

In support of their motion for a new trial, plaintiffs first argue that the jury selection process was flawed. They contend that they had to select the jury from a non-random panel, in violation of the Constitution and the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. Plaintiffs assert that the jury pool impermissibly was composed of individuals from a previously selected pool who had agreed to serve for an additional two weeks[2] and

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[2] It is not entirely clear what plaintiffs mean when they state in their brief that the panel was made up of "volunteers from a previously selected pool who agreed to serve for an additional two weeks." Pls' Br. in Support of Mot. for New Trial and/or J.N.O.V. at 7. The part of the transcript to which they refer us is plaintiffs' counsel's statement at Tr. Oct. 7, 1998, p. 42,set forth infra, in which he states that the panel was made up of only those jurors who had indicated they were available for more than two weeks of service, if necessary.

that this procedure somehow resulted in prejudice to them because a disproportionate number ofprospective jurors were related to or friends of police officers.

First, the fact that prospective jurors may be related to or friends of police officers does not disqualify them as jurors. Each prospective juror who was not stricken confirmed to the satisfaction of the court that he or she was impartial and would decide the case solely on the evidence presented and the law as explained by the court.

In addition, in order to preserve an objection to the composition of the jury panel, the party advancing the challenge has the burden of making a clear, on-the-record objection. See Horsey v. Mack Trucks, Inc., 882 F.2d 844, 849 (3d Cir. 1989). Plaintiffs made no such objection about the use of any voluntary selection procedure. In fact, they waived any objection when their counsel stated:

> [T]his panel, of course, is a panel that was available for more than a regular two weeks' service. They, and [sic] indicated on a voluntary basis that they would be available for the jury selection process. I'm not making any, any adverse comment about that procedure. I understand that that was a necessary and a reasonable procedure.

Tr. Oct. 7, 1998, p. 42 (emphasis added). For this reason, plaintiffs cannot now challenge the use of any voluntary jury selection procedure.

Plaintiffs also contend that the court's decision not to question the prospective jurors individually about their

specific residential addresses was error. The lack of information about panel members, specific addresses, they argue, led to the selection of a prejudiced juror, who served as foreperson. They assert that the foreperson knew their daughter, Carrie Livingstone, who according to them was "a key defense witness," yet the juror refused to disclose his familiarity with Carrie Livingstone to the court. Plsl Br. in Support of Mot. for New Trial and/or J.N.O.V. at 9. It is their position that if they had information about where the jurors lived, they would have been able to recognize who the juror was and that he knew their daughter.

The argument fails for a number of reasons. First, a court is not required to ask individually a out prospective jurors, specific addresses. Local Rule 47.1(C)(1) for the Western District of Pennsylvania provides, "The following questions, where appropriate, shall, inter alia, be put to each juror individually: 1. Where do you live? ...." (emphasis added). Plaintiffs had information showing the counties in which the potential jurors lived, and there was no reason to question individually the members of the panel about their exact addresses. See Tr. Oct. 7, 1998, p. 20. Second, there is no evidence plaintiffs were prejudiced. They have presented nothing to support their contention that the jury foreperson, as opposed to other members of his family,[3] did in fact know Carrie Livingstone. They have

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[3] Mrs. Livingstone attached an affidavit to the motion for a new trial and/or judgment notwithstanding the verdict in which she stated that in 1998 she had spoken to the foreperson's sister on the telephone and had given her Carrie's telephone number, that Carrie had dated the foreperson's brother twelve or thirteen years ago, and that she remembered driving Carrie to the brother's residence

come forward with no evidence that he failed to answer honestly the court's voir dire questions about the jurors, knowledge of any party or witness, or that he was biased against plaintiffs in any way.[4]

IV.

The Livingstones next argue that they are entitled to a new trial because the charge given to the jury improperly instructed it on the issue of consent to search their home. The court told the jurors:

> The Fourth Amendment states, ["T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated .[... 11) Ordinarily, a search warrant must be obtained from a judge before any search of a home may be made. In this case,

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during the time they dated. Without stating the basis, she posited that it was her "belief and understanding" that the foreperson also knew Carrie. This is insufficient evidence, however, to demonstrate that the foreperson failed to answer truthfully the court's inquiry about whether he knew Carrie Livingstone.

[4] Because plaintiffs have no evidence whatsoever that the jury foreperson failed to answer truthfully the court's questions or was prejudiced against them, or that there was any juror misconduct, we deny their request to interview the foreperson and their request for a hearing on this matter. See Fed. R. Evid. 606(b).

there was no search warrant. There are, however, certain exceptions to the search warrant requirement.

One such exception, where a search warrant is not needed, is a search conducted by consent. If a person, in lawful possession of.a home,freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct a search, to the extent of the consent so given. The people who may consent to a search of a residence include not only the individuals who own the property being searched, but also any third party who possesses common authority over the premises. ["]Common authority["] means that the third party has mutual use of the property and, generally, has joint access or control for most purposes. Any consent must be given voluntarily. Whether a consent is voluntary depends on the totality of the circumstances.

Another exception to the warrant requirement is.recognized in emergency situations ....

Tr. Oct. 20, 1998, pp. 15-16. Plaintiffs do not point to any part of this instruction as an improper statement of the law. Rather, they argue that the court should have added that "[a]n adult family member lacks authority to overrule the objections of a nonabsent owner of the home," and that any consent must be "unequivocally, specifically and intelligently given and must be proved by clear and positive evidence." Pls' Br. in Support of Mot. for New Trial and/or J.N.O.V. at 2. We consider the jury instructions as a whole in determining whether they fairly and adequately convey the applicable law. See Koppers Co., Inc. v. Aetna Cas. and Sur. Co. 98 F.3d 1440, 1445 (3d Cir. 1996).

A third party who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give valid consent to a search. United States v. Matlock, 415 U.S. 164, 171 (1974). The Supreme Court has explained:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 172 n.7. Consent must be given voluntarily. Voluntariness is to be determined based on the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

Plaintiffs cite United States v. Imipink, 728 F.2d 1228 (9th Cir. 1984), in support of their argument that "[a]n adult family member lacks authority to overrule the objections of a nonabsent owner of the home." The case does not advance such a sweeping proposition. Impink involved a warrantless search of a lessee's property, purportedly pursuant to the implied consent of the lessor, who had retained a right to enter and store property in part of the premises. The Court of Appeals for the Ninth Circuit concluded, based on a number of factors, that the lessor had not given effective consent and that the search was invalid. See id. at 1234.

This case is easily distinguishable from Impink. Here, unlike the lessor in Impink, Carrie Livingstone was present at the house and clearly invited the officers inside. Also, in contrast to the different rights of access of the lessor and the lessee in Impink,, there was no evidence that Carrie's right of access to the house, or her father's bedroom, was more limited than the right of access of her mother. As previously noted, Mr. and Mrs. Livingstone had separate sleeping arrangements.

Plaintiffs cite United States v. Travis, 62 F.3d 170 (6th Cir. 1995), in support of their position that the jury should have been instructed that consent must be "unequivocally, specifically and intelligently given." The opinion does not support the argument. The Supreme Court has stated that voluntariness is determined based on the totality of the circumstances. See Schneckloth, 412 U.S. at 227. The Court of Appeals for the Third Circuit, citing Schneckloth, has explained that "whether consent was given is to be resolved by examining all relevant factors, without giving dispositive effect to any single criterion." United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994).

The jury instructions, we believe, fairly and adequately represented the law on the issue of a consensual search. Merely because Carrie did not own the property and did not pay rent does not mean she did not have common authority over the premises. In addition, the jury was instructed that any consent to a search had to be given voluntarily and that voluntariness depended on the totality of the circumstances.

The Livingstones next contend that the instructions improperly conveyed to the jury that the police had the

right "to utilize force in order to seize the child." Plsl Br. in Support of Mot. for New Trial and/or J.N.O.V. at 5. No such instruction was given. The jury was charged, "You are instructed that it is the law in Pennsylvania that a parent has the right to custody of her child absent convincing reasons that it would not be in the best interests of the child." Tr. Oct. 20, 1998, p. 16. In custody disputes, Pennsylvania courts apply a weighing analysis in which parenthood is a "factor of significant weight." Rowles v. Rowles, 668 A.2d 126, 128 (Pa. 1995). There was no evidence that Carrie was an inadequate mother. The instruction in this case fairly and adequately informed the jurors about the custodial rights of parents in Pennsylvania and provided the jury with a basis for determining whether Carrie Livingstone, the child's mother, acted properly in directing the officers to retrieve her child from Mrs. Livingstone.

V.

Plaintiffs assert that the court should grant them a new trial because it improperly dismissed their § 1983 malicious prosecution and abuse of process claims. The complaint alleges claims for malicious prosecution and abuse of process under federal law (the Count I § 1983 claim) and under state law (Counts III and IV).

In 1994, the defendants moved for summary judgment on all counts of the complaint. The magistrate judge, in his report and recommendation dated June 8, 1994, recommended that summary judgment be granted in favor of the defendants on plaintiffs, state law claims for malicious prosecution and abuse of process, Counts III and IV. Under Pennsylvania law, if charges in an underlying criminal action are dropped as a result of a compromise between the parties, the accused may not bring a subsequent action for malicious prosecution. See Junod v. Bader, 458 A.2d 251, 253-54 (Pa. Super. 1983). The

magistrate judge concluded that because Mrs. Livingstone's criminal proceeding had terminated as a result of a compromise, it was not a termination in favor of the plaintiff. Consequently, he reasoned that the malicious prosecution count should be dismissed. He also recommended that defendants' motions for summary judgment be granted on the abuse of process claim because there was no evidence of the required "perversion of the [judicial] process." Rep. and Rec., June 8, 1994, pp. 13-14. He did not separately address plaintiffs, § 1983 claims for malicious prosecution.and abuse of process. In its July 11, 1994 order, the district court adopted the report and recommendation of the magistrate judge as the opinion of the court and granted summary judgment on Counts III and IV, the state law claims. The court then held a jury trial on the sole issue of whether plaintiffs voluntarily had entered into the release-dismissal agreement. After the jury decided in favor of the defendants, and the district court entered judgment, plaintiffs appealed. We have reviewed plaintiffs, briefs filed in support of their appeal, and they did not raise any issue contesting the propriety of the district court's entry of summary judgment in favor of defendants on Counts III and IV. As a result, the Court of Appeals, in Livingstone, 91 F.3d 515, did not address the issue.

Plaintiffs, apparently conceding that they are foreclosed from pursuing their state law claims for malicious prosecution and abuse of process, now argue that they should have been allowed to pursue those same claims under § 1983 as contrary to their due process rights under the Fourteenth Amendment. Counsel for all parties discussed these § 1983 claims with the court in October, 1998, during a conference which took place in chambers and off the record. The court concluded that these claims

were no longer in the case for the same reasons that the common law claims for malicious prosecution and abuse of process were no longer in the case.

The elements of a § 1983 cause of action for malicious prosecution mirror the common.law elements. See Hilfirtv v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996); Lee v. Mihalich, 847 F.2d 66, 70 (3d Cir. 1988).[5] One element the plaintiffs must prove to establish their malicious prosecution claim is that the underlying criminal proceedings terminated in their favor. See Lippay-v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993). This fact was determined against plaintiffs when the district court granted summary judgment on the state law claim for malicious prosecution.[6] The Livingstones could not establish the

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[5] The authority of Lee was called into question by the Supreme Court's opinion in Albright v. Oliver, 510 U.S. 266 (1994), which some courts interpreted as concluding that plaintiffs may not pursue S 1983 claims for malicious prosecution unless they are based on the Fourth Amendment. See e.g. Brooks v. Carrion, 1996 WL 563897, at *3 (E.D. Pa. Sept' 26, 1996) (citing cases). However, the Court of Appeals for the Third Circuit subsequently determined that Albright does not create such a broad ban on § 1983 malicious prosecution claims, and that such claims may be based on constitutional provisions other than the Fourth Amendment. See Torres v. McLaughlin, 163 F.3d 169, 172 (3d Cir.1998).

[6] After the district court granted summary judgment on Counts III and IV, it determined that the Livingstones had entered into an oral contract with Washington Township during the criminal proceeding. However, that contract was deemed unenforceable as a release-dismissal agreement.

favorable termination element because Mrs. Livingstone's criminal case ended with a compromise between the parties. See Junod, 458 A.2d at 253-54.[7] Moreover, they surrendered any right they had to challenge the district court's finding that the criminal proceeding did not terminate in their favor when they failed to raise the issue on appeal in Livingstone, 91 F.3d 515.

The elements of the § 1983 cause of action for abuse of process are identical to those for the common law cause of action. See McArdle v. Tronetti, 961 F.2d 1083, 1088 (3d Cir. 1992). As the district court determined when it granted summary judgment on the state law claim for abuse of process, the Livingstones could not establish the element which required them to show that the underlying criminal proceedings were "perversely, coercively, or improperly

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See Livingstone v. North Belle Vernon Borough, No. Civ. A. 91-59 (W.D. Pa. Nov. 24, 1997). These subsequent developments do not alter the conclusion that the criminal proceedings ended with a compromise that prevents plaintiffs from establishing the favorable termination element of their § 1983 malicious prosecution claim.

[7]No party has argued that there are different standards under federal law and state law for determining whether there has been a favorable termination of criminal proceedings. In Hilfirty, the Court of Appeals for the Third Circuit looked to state law in determining whether the plaintiff had met the favorable termination element of her § 1983 malicious prosecution claim. See Hilfirty, 91 F.3d at 579-81. The Court cited Junod, 458 A.2d 251, with approval. See id.

used." Cameron v. Graphic Management Assoc., Inc., 817 F. Supp. 19, 21 (B.D. Pa. 1992). Plaintiffs may not now challenge this determination because, again, they waived the issue when they failed to raise it on appeal in Livingstone, 91 F.3d 515.

It also appears from the record that plaintiffs, counsel acquiesced in the court's decision not to charge the jury on the §1983 claims for malicious prosecution and abuse of process. See Tr. Oct. 14, 1998, p. 258-62.

Therefore, for all of the above reasons, plaintiffs are not entitled to a new trial to pursue their S 1983 claims for malicious prosecution and abuse of process.

VI.

Plaintiffs argue that the court erred in granting judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure in favor of defendants — North Belle Vernon Borough and Fayette City Borough. Granting a Rule 50 motion is improper if the evidence and reasonable inferences most favorable to the non-moving party provide any rational basis for a verdict in that party's favor. See Delli Santi v. CNA Ins. Companies, 88 F.3d 192, 200 (3d Cir. 1996).

Plaintiffs argued that these municipal defendants were liable under S 1983 because of their failure adequately to train their police officers regarding the proper use of a stun gun and how to respond appropriately to domestic disputes. The Supreme Court has explained:

> [Tlhe inadequacy of police training may serve as the basis for S 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact

> .... Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference,, to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983 .... "[Mlunicipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.

City of Canton, Ohio v. Harris, 489 U.S. 378, 388-89 (1989) (citation omitted). Plaintiffs must prove that the training provided, if any, was inadequate and that the municipalities, choice to utilize or continue that training reflected deliberate indifference to the rights of their inhabitants. See id. at 389.

Plaintiffs presented no evidence about Fayette City Borough's training programs or lack thereof. Although they demonstrated that North Belle Vernon Borough had trained its officers in the use of stun guns, they proffered no evidence that the training was inadequate. In addition, plaintiffs did not introduce any evidence demonstrating whether either of these municipalities had investigated or knew anything about Washington Township's training programs. For these reasons, there was no rational basis for a verdict in favor of plaintiffs and against North Belle Vernon Borough or Fayette City Borough on the § 1983 claims, and the grant of the their Rule 50 motions was proper.

VII.

Plaintiffs raise a number of other arguments about purported errors at trial. These arguments are without merit and require no discussion.

VIII.

Plaintiffs have also moved for judgment notwithstanding the verdict. They maintain that if the jury had been instructed properly about consensual searches and the use of force, there was insufficient evidence to find in favor of defendants. We disagree. Based upon the testimony of Carrie Livingstone and her father, who stated that Carrie had "free rein of the house, to go in any parts of the house that she wished," Tr. Oct..8, 1998, p. 7, the jury reasonably found that Carrie had common authority over the Livingstone house, including her father's bedroom, such that her consent was sufficient to justify the officers' entrance. Additionally, based upon Officer Monack's testimony that the officers used only that force necessary to effectuate Mrs. Livingstone's arrest for assaulting him, the jury reasonably determined that the officers did not use excessive force against Mrs. Livingstone or subject her to an assault and battery.

Accordingly, we will deny plaintiffs' request for a judgment notwithstanding the verdict.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3593

FRANCES E. LIVINGSTONE; and JOSEPH A. LIVINGSTONE, her husband,

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH,

Frances E. Livingstone and Joseph A. Livingstone,
Appellants

Appeal from the Order of the United States District Court for the WesternDistrict of Pennsylvania, at Civil Action No. 91-cv-0059

APPELLANTS' PETITION FOR REHEARING TOGETHER WITH SUGGESTION FOR EN BANC CONSIDERATION

APPELLANTS' PETITION FOR REHEARING TOGETHER WITH SUGGESTION FOR EN BANC CONSIDERATION

Now comes the Appellants, by and through their Counsel, Peter M. Suwak, Esquire, and request this Court grant rehearing pursuant to FRAP No. 40, or, alternatively, rehearing en banc, based upon the following:

1. In accordance with Third Circuit LAR 35.1, counsel for appellants expresses a belief, based on a reasoned and studied professional judgment, that the proceeding involves one or more questions of exceptional importance, to wit:

a. Does the set aside of a release/dismissal agreement pursuant to Town of Newton v. Rumery, 480 U.S. 386(1987) permit a claim pursuant to 42 U.S.C. §1983 for malicious prosecution and abuse of process or is the claim defeated since the release/ dismissal agreement, although invalid, nonetheless was the result of a compromise?

b. Do exigent circumstances created by police conduct justify the entry into a locked and occupied bedroom following consent to enter a dwelling by a non-rent paying daughter over the objection of property owning parents who were present?

2. This matter came before a panel of this Court comprised of Circuit Judges Mansmann, Nygaard and Rendell, which on or about March 16, 2000, issued a Memorandum Opinion, authored by Judge Nygaard. A copy of the opinion and judgment is attached hereto as Exhibit A.

3. The issues on appeal include the following:

a. Does the set aside of a release/dismissal agreement pursuant to Town of Newton v. Rumery, 480

U.S. 386(1987) permit a claim pursuant to 42 U.S.C. §1983 for malicious prosecution and abuse of process or is the claim defeated since the release/ dismissal agreement, although invalid, nonetheless was the result of a compromise?

b. Do exigent circumstances created by police conduct justify the entry into a locked and occupied bedroom following consent to enter a dwelling by a non-rent paying daughter over the objection of property owning parents who were present?

c. Whether the matter should be remanded to permit questioning of the jury foreman regarding his failure to identify that he knew a material defense witness?

4. This Memorandum opinion is subject to reconsideration and/or en banc consideration for the following reasons:

a. The panel considered the question concerning the effect of the release/dismissal on the federal malicious prosecution and abuse of process claims at pages 22 through 28 of their opinion. The panel opinion misapprehended the record below as they specifically indicated that the record gave no indication that the release/dismissal agreement had been "set aside" (see Opinion, p. 26). This was a critical misunderstanding since the Livingstones' argument was premised on the fact that the release /dismissal agreement had been declared void and accordingly, could not be relied upon to protect the police.

b. In fact, Chief Judge Ziegler had issued a partial summary judgment in favor of the Livingstones following remand after the Livingstones' second appeal in Livingstone v. North Belle Vernon Borough, 91 F.3d 515 (3rd Cir, 1996). This opinion and order could be found at pages 142a through 155a of the Appendix and is here reproduced as Exhibit B for the convenience of the court.

c. In relevant part, the lower court made the following analysis:

> A section 1983 claim is based on improper action by an individual acting under color of state law which results in deprivation of any rights, privilieges, or immunities secured by the Constitution." 42 U.S.C. §1983. Therefore, before Heneks could reasonably determine whether the Livingstones section 1983 was marginal or frivolous, he had to consider the evidence of the alleged police misconduct. Indeed, Heneks admitted that, "[w]ell, to the extent that there's a medical report indicating there's some kind of injury undefined and to the extent that a stun gun was used on an area that was somewhere close to it, [] there at least was some basis to at least start with an analysis of whether there was a civil action." Plaintiffs' Exhibit A pg. 52. Notwithstanding these facts, Heneks only conducted a casual analysis of the viability of the Livingstones' section 1983 claim, and ultimately decided the case based on the officers' version of events rather than Mrs. Livingstone's version. Id. at 78.
>
> Furthermore, Heneks had no evidence which "undercut" Mrs. Livingstone's medical evidence. During his deposition, Heneks stated that he did not believe that Dr. Noche, who examined Mrs. Livingstone after the incident, had fabricated the report. Plaintiffs' Exhibit A at pag. 45. Instead, Heneks accepted the officers' statements that Mrs. Livingstone could have injured herself. Id. at 34,44. This, however, is insufficient to undermine plaintiffs' medical evidence.
>
> In Livingstone II, the Court of Appeals advised that it "would not suffice for the defendant

municipalities and police officers to demonstrate on remand that Heneks was aware of other evidence that merely contradicted the ...evidence of police misconduct... Instead, defendants would have to demonstrate that Heneks was aware of other evidence that rendered the ...evidence of police misconduct fundamentally untrustworthy." 91 F.3d at 532. Heneks' deposition reveals that he did not possess such evidence.

Given these facts, we find that the agreement is unenforceable as a matter of law. We therefore will grant plaintiffs' motion for partial summary judgment, and deny defendants' motion for partial summary judgment. (Exhibit B, App. pp. 151a-152a, Opinion pp. 10-11).

d. The panel opinion indicated that even if the agreement had been set aside, that would be immaterial to the question of whether or not the charges against Mrs. Livingstone had resulted in a favorable termination as a precondition to establishing a federal malicious prosecution or abuse of process action. Clearly as this issue grows out of this circuit's continuing evolution of the Rumery analysis, it is an important issue of first impression.

e. Nine years of appellate work resulted in the creation of the leading precedent in the issue of overturning release/dismissal agreements under impliedly coercive circumstances. The Livingstone precedents essentially stand for the proposition that the police and prosecutors have a heavy burden to justify the obtaining of a release from civil charges while the defendant is under the threat of criminal charges. The elaborate procedure establishing the difficult hurdles for the police and prosecutor necessary to justify the release, now makes it clear that such releases are not favored in this Circuit.

The exact same rationale supports the idea that plaintiffs should have been permitted to proceed with their malicious prosecution claim. If the release was obtained coercively, contrary to public policy and without justification under civil rights law, then it would be incongruous to nonetheless give legal effect to the set-aside agreement by making it the vehicle by which it was determined there is no favorable termination. The coercive aspect of obtaining the agreement vitiated the consent and nullified the agreement. Since the agreement was a nullity, the dismissal of charges constitutes a favorable termination. Consistency mandates that the malicious prosecution and abuse of process components of the civil rights count be permitted to proceed.

f. Since the initial consideration of the Rumery application to the facts of this case justified en banc review in Livingstone v. North Belle Vernon Borough, et al., 12 F.3d 1205 (3d Cir. 1993), it is respectfully submitted that this issue of first impression, which constitutes an extension and development of that rationale should also be so considered.

g. The panel considered the issue of whether the Livingstones' daughter had authority to consent to the entry of her parents' locked and occupied bedroom at pages 7 through 13 of their opinion. The panel distinguished United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) which held that where a suspect is present in objecting to a search, implied consent by a third party with an inferior privacy interest is ineffective, on the basis that the daughter did not have an inferior privacy interest. The adult daughter was living rent-free at the home owned by her parents. The panel's opinion failed to establish that the daughter had any expectation or control over the locked bedroom of the present and objecting parent.

h. Instead, the panel made the following finding:

> Having held that the Livingstones' daughter had the authority to consent to a search of their home, we find it unnecessary to decide whether that authority extended to Mr. Livingstone's bedroom Once the police had valid consent to enter the house itself, the fact that Mrs. Livingstone had taken her grandson into the bedroom, where she claimed to have a loaded gun and threatened to use it, clearly created exigent circumstances. As the District Court correctly instructed the jury, exigent circumstances can justify a warrantless search and seizure with or without valid consent. (Citations omitted.)(See Opinion, p. 12.)

i. However, this situation was created as a result of the police determination to press forward. The police admitted that no one was placed under arrest until after they had broken down the door to Joseph Livingstone's bedroom. (App. p. 1164a). There is no authority justifying entry into the home and/or the bedroom and/or the utilization of force to effectuate custody of the child under these circumstances where there was no immediate danger to the child. There is no legal foundation to utilize force in order to seize the child. The police had no court order to enforce. They had no search warrant to be upon the premises, and Officer Monack admitted that he made no decision to arrest until after he had broken the door down.

j. Under these circumstances, it is respectfully submitted that the panel erred in blaming Mrs. Livingstone for the creation of the circumstances leading to her being assaulted and stun gunned. From all the circumstances, it cannot be concluded that the police had the right to enter the bedroom.

k. Finally, the panel considered the Livingstones' challenge to the jury pool and foreman at pages 13 through 19 of their opinion. Although the panel recognized that the jury pool had been selected from volunteers, over fifty percent of which were related to police officers, the panel indicated that there was insufficient evidence of prejudice to justify a finding of plain error. The Livingstones complained that they later discovered that the jury foreman knew their daughter, a chief defense witness, and the foreman failed to reveal that knowledge during voir dire.

l. The key panel rationale in this regard follows:

> More importantly, the Livingstones have failed to present any evidence that the juror in question was being dishonest in failing to respond affirmatively when the jurors were asked whether they knew any of the parties or witnesses in the case. Even if we were to assume that the juror had had some passing contact with the Livingstones' daughter in the past, it would not be unresaonable to think he may simply have forgotten her in the intervening years. A mistaken but honest answer to a question on voir dire is not grounds for a new trial. (Citation omitted.) To obtain a new trial, as the Linvingstones seek, they are required to show:(1)that a juror failed to answer honestly a material question on voir dire; and (2)that a correct response would have provided a valid basis for challenging for cause. (Citation omitted.) They have failed to make the necessary showing. (See Opinion, pp. 17-18.)

m. However, the Livingstones had submitted an affidavit attached to their motion for new trial. They then requested the lower court to grant them permission to speak to the juror and to hold a hearing to determine the juror's motives. It is respectfully submitted that the panel has

erred to conclude that the legal standard cannot be met in the absence of the grant of this permission and hearing. This is particularly true since the jury apparently chose to disregard the testimony of Dr. Noche, the emergency room physician who observed a white burn-like lesion in the vaginal canal of Mrs. Livingstone a few hours after she was subjected to the stun gun attack. In light of the extended history of this case, the Livingstones ask the court to remand the matter so that there can be a hearing regarding the juror and a determination as to whether or not they can fairly be expected to accept the jury's result.

WHEREFORE, this Honorable Court is requested to grant a rehearing pursuant to F.R.A.P. No. 40, or, alternatively, rehearing en banc, pursuant to F.R.A.P. 35(b).

Respectfully submitted,

Peter M. Suwak, Esquire
Counsel for Appellants
PA I.D. #23779

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband
Plaintiffs,
v.
NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH;WASHINGTON TOWNSHIP; FRANK E.MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; and OFFICER DARHL SNYDER, individually and in his capacity) as an officer for NORTH BELLE VERNON BOROUGH,
Defendants.

OPINION

ZIEGLER, Chief Judge.

Pending before the court are the parties' cross-motions for partial summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Plaintiffs, Frances and Joseph Livingstone, commenced this action under 42 U.S.C. S 1983, alleging civil rights violations and various state law claims.

The Livingstones currently seek partial summary judgment on the enforceability of an oral release/settlement agreement which they executed on or about February 16, 1990. The Livingstones further seek a determination that Fayette City Borough and North Belle Vernon Borough are not third-party beneficiaries of the release- settlement agreement. Defendants, Fayette City Borough, Officer Darhl Snyder, North Belle Vernon Borough, and Washington Township, seek partial summary judgment that they are third-party beneficiaries of the release-settlement agreement between the Livingstones and Washington

Township. For the reasons that follow, we will grant the plaintiffs' motion for partial summary judgment and deny the defendants' motion for partial summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident in which defendantpolice officers responded to a domestic complaint involving plaintiffs, their daughter and her child. As a result of the incident, Mrs. Livingstone was arrested and charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with child custody.

Attorney Thomas Ceraso represented Mrs. Livingstone during the criminal proceedings. On the third day of trial, an oral release-settlement agreement (the "agreement") was reached whereby the criminal case against Mrs. Livingstone would be dismissed by way of motion for judgment for acquittal in exchange for a mutual release of any civil claims and an agreement by Washington Township to pay Mrs. Livingstone's expenses and medical costs.

Notwithstanding the agreement, the Livingstones filed this civil action on January 14, 1991, claiming violation of 42 U.S.C. 5 1983 (1988) and various state law claims. Judge Cohill previously granted summary judgment on the agreement. In Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993) ("Livingstone I"). the Court of Appeals reversed holding that there was a genuine issue of material fact as to whether Mrs. Livingstone's assent to the agreement was voluntary. Id. at 1214-15. On remand, a jury found that the Livingstones deliberately, knowingly, and voluntarily waived their right to file a civil action against the defendants. (Doc. No. 116).

In Livingstone v. North Belle Vernon Borough, 91 F.3d 515 (3d Cir. 1996) ("Livingstone II"), cert. denied,

___U.S.___, 117 S.Ct. 1311 (1997), the Court of Appeals again reversed for consideration of the following issues: (1) whether (and how) the Livingstones formed a contract with Washington Township, Fayette City Borough and North Belle Vernon; (2) assuming a contract was formed with Washington Township alone, whether the Fayette City Borough and North Belle Vernon Borough are third-party beneficiaries of the contract; (3) whether the Livingstones' civil rights claims were regarded -- and, if so, whether they were properly regarded -- by Mr. Heneks, the prosecuting attorney, as marginal or frivolous; (4) whether Mr. Heneks knew or should have known of the evidence of police misconduct; and (5) if Mr. Heneks did know, or should have known of the evidence of police misconduct, whether other facts were available to 61 undercut" the evidence of misconduct. We will consider these issues seriatim.

STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, we must examine the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

CONTRACT FORMATION

We must apply Pennsylvania law in deciding whether the Livingstones entered into a contractual relationship with the officers and the municipalities. The Livingstones concede that Cerasols in camera colloquy was an offer to Washington Township as well as Fayette City and North Belle Vernon. Although the Livingstones argued on appeal that Washington Township never properly

accepted the offer, they have not raised that argument here. However, they do contend, without rejoinder from Fayette City and North Belle Vernon, that because Fayette City and North Belle Vernon did not accept their offer, there is no enforceable agreement with these two defendants.

To form a contract under Pennsylvania law, there must be an offer, acceptance and consideration. Stumpp v. Stroudsburg Mun. Auth., 658 A.2d 333, 335 (Pa. 1995). "An offer must be intentional, definite, [sic] in its terms . . . communicated[,]" id., and express a present or future intent to be bound. Morosetti v. Louisiana Land and Exploration Co., 564 A.2d 151, 152 (Pa. 1989). Acceptance must be clear and unequivocal and on the same terms as the offer. RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981). Consideration, which "'is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made," is an essential element of an enforceable contract. Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 128 (Pa. 1940).

Here, Attorney Ceraso's in camera colloquy constituted an offer to Washington Township expressing an intent by Mrs. Livingstone to enter into an agreement. Counsel's statement manifested an intent to be bound, was definite in the terms and was communicated to Washington Township. The offer was accepted by Washington Township, as evidenced by the two Township Supervisors' oral promise to pay the Livingstones, bills incurred during the incident and by approving the agreement. Even though there was no official meeting, the offer was ratified by the Board of Supervisors in 1992. [1]

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[1]Any objection to business transacted in violation of the Pennsylvania Sunshine Act must "be filed within 30 days from the . . . discovery of any action that occurred at a

The consideration for the contract was the Livingstones' agreement to give up their right to file a civil rights claim against Washington Township in exchange for releasing Mrs. Livingstone from further criminal prosecution and for a release from liability in the ongoing criminal case. Finding the requisite elements for contract formation present, we therefore conclude that the Livingstones entered into an oral contract with Washington Township on or about February 15, 1990.

However, Fayette City and North Belle Vernon did not accept the Livingstones' offer. The proper authorities did not express an intent to be bound, and there was never any action taken by the municipal authorities to ratify the contract.

THIRD-PARTY BENEFICIARY

Our inquiry, however, does not end here. We now must consider whether Fayette City and North Belle Vernon are third- party beneficiaries of the agreement. Under Pennsylvania law, for a third party to have standing under a contract, both parties (promisor and promisee) must express an intention to benefit the third party. The Restatement (Second) of Contracts, § 302 (1979), adopted by the Pennsylvania Supreme Court in Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983), states:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance

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meeting which was not open at which the act was violated." 65 P.S. §283. Furthermore, no "challenge may be commenced more than one year from the date of said meeting." Id. Any objection to the Board's action is outside the time limits provided by the act.

in the beneficiary is appropriate to effectuate the intentions of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id.

The first part of the test sets forth a standing requirement which allows this court discretion to determine whether recognition of a third-party beneficiary status is appropriate. Guy, 459 A.2d at 751. The first part provides, "a party becomes a third party beneficiary only where **both parties** to the contract express an intention to benefit the third party in the contract itself, . . ., unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties." Scarpitti v. Weborg, 609 A.2d 147, 150-51 (Pa. 1992) (emphasis added). The second part of the test defines the types of claimants who may be intended as third party beneficiaries. Id.

Applying these rules to the present case, we find that neither Fayette City nor North Belle Vernon are third-party beneficiaries of the agreement for several reasons. First, the express language used by Attorney Ceraso referred to Washington Township. While an agreement need not specifically identify those individuals intended to benefit therefrom, Guy, 459 A.2d at 752 n.8, counsel did not refer to the municipalities as beneficiaries, or use language evidencing an intent to benefit them.

Second, when Mrs. Livingstone questioned whether the release agreement would include all three defendants,

Attorney Ceraso replied, "Well, in reality, no." Defendants Exhibit A at pg. 276. He further stated that "I have no objection if those police departments [Fayette City and North Belle Vernon] or those municipalities also wish to be included in the release, and we would then have reciprocal releases from them, and we would let that up to their individual counsel to make that decision." Id.(emphasis added). This language evidences an intent to enter into a contractual relationship whereby plaintiffs would forego filing a section 1983 suit if the municipalities would execute releases. Moreover, counsel's statement that he would "let that up to their individual counsel to make that decision" supports the conclusion that this was an offer to Fayette City and North Belle Vernon.

Third, when questioned during his deposition, Attorney Ceraso stated, "[w]e, in effect, made an offer to anybody else that was involved and, in effect, said to them, we will put you in the same position as we are putting Washington Township at your option: If you want a release from us, we want a reciprocal release from you." Plaintiffs' Exhibit C at pg. 132 (emphasis added). Based on the language in the colloquy, and based on counsel's deposition testimony, we find that the Livingstones did not intend Fayette City and North Belle Vernon to be third-party beneficiaries of the agreement. Therefore, Fayette City and North Belle Vernon are not covered by the agreement.

ENFORCEABILITY OF THE RELEASE-DISMISSAL AGREEMENT

In Town of Newton v. Rumery, 480 U.S. 386 (1987), the United States Supreme Court articulated the standard by which release/dismissal agreements are to be evaluated. Such agreements are enforceable if they are voluntarily executed, free from prosecutorial misconduct

and are not offensive to the relevant public interest. Id. at 398.

In Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993), cert. denied, 510 U.S. 1195 (1994), the Court of Appeals held that "mere voluntariness is not enough to support enforcement of a release-dismissal agreement." Id. at 381. Although the Court of Appeals noted that "there are [] strong public interests in allowing section 1983 suits and, conversely, strong public interests against release-dismissal agreements that bar colorable section 1983 claims[,]" id. the court concluded that "there must first be a case-specific showing that the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason." Cain, 7 F.3d at 383.

In Livingstone II, the Court of Appeals, relying on Cain, remanded for consideration of the following issues: (1) whether the Livingstones' civil rights claims were regarded -- and, if so, whether they were properly regarded -- by Mr. Heneks, the prosecuting attorney, as marginal or frivolous; (2) whether Mr. Heneks knew or should have known of the evidence of police misconduct; and (3) if Mr. Heneks did know, or should have known of the evidence of police misconduct, whether other facts were available to "undercut" the evidence of misconduct. 91 F.3d at 531-32.

The Livingstones argue that Heneks did not make a "reasoned analysis" that their civil rights claim was marginal or frivolous because he did not consider or investigate the evidence of police misconduct. Defendants contend, without addressing Mr. Heneks' statement that he did not consider whether there was police misconduct, that Heneks made a determination as to the marginal or frivolous nature of the Livingstones' civil rights claim. During his deposition, taken after the Court of Appeals' decision in Livingstone II, Mr. Heneks stated that he

"casually" considered whether plaintiff had a civil action. Plaintiffs' Exhibit A at pg. 49. Heneks further stated that, even though he was aware of the facts supporting a conclusion of police misconduct, he did not evaluate whether or not there was police misconduct because he "was just prosecuting the case." Id. at 41, 92. [2]

A section 1983 claim is based on improper action by an individual acting under color of state law which results in "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. S 1983. Therefore, before Heneks could reasonably determine whether the Livingstones section 1983 was marginal or frivolous, he had to consider the evidence of the alleged police misconduct. Indeed, Heneks admitted that, "[w]ell, to the extent that there's a medical report indicating there's some kind of injury undefined and to the extent that a stun gun was used on an area that was somewhere close to it, (I there at least was some basis to at least start with an analysis of whether there was a civil action." Plaintiffs' Exhibit A at pg. 52. Notwithstanding these facts, Heneks only conducted a casual analysis of the viability of the Livingstones' section 1983 claim, and ultimately decided the case based on the officers' version of events rather than Mrs. Livingstone's version. Id. at 78.

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[2] Defendants also rely on Attorney Alphonse Lepore's deposition to support their claim that the prosecutors did consider whether plaintiffs' civil rights claim was marginal or frivolous. Lepore, however, only supervised Heneks during the criminal trial. Moreover, Lepore, who stated that he did not recall that there was medical information corroborating Mrs. Livingstone's claim, did not possess evidence to "undercut" this evidence.

Furthermore, Heneks had no evidence which "undercut" Mrs. Livingstone's medical evidence. During his deposition, Heneks stated that he did not believe that Dr. Noche, who examined Mrs. Livingstone after the incident, had fabricated the report. Plaintiffs' Exhibit A at pg. 45. Instead, Heneks accepted the officers' statements that Mrs. Livingstone could have injured herself. at 34, 44. This, however, is insufficient to undermine plaintiffs' medical evidence.

In Livingstone II, the Court of Appeals advised that it "would not suffice for the defendant municipalities and police officers to demonstrate on remand that Heneks was aware of other evidence that merely contradicted the . . . evidence of police misconduct. . . . Instead, defendants would have to demonstrate that Heneks was aware of other evidence that rendered the . . . evidence of police misconduct fundamentally untrustworthy." 91 F.3d at 532. Heneks' deposition reveals that he did not possess such evidence.

Given these facts, we find that the agreement is unenforceable as a matter of law. We therefore will grant plaintiffs' motion for partial summary judgment, and deny defendants' motion for partial summary judgment.

An appropriate order will followl

Dated: November 24, 1997 /s/_____

Donald E. Ziegler
Chief Judge